91-2040 (1)

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

J.M., guardian ad litem
of his unborn child

Petitioner,

-against-

V.C.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Where a natural genetic father seeks to enjoin the abortion of his unborn child, is the denial of the injunction by the Supreme Court of New Jersey violative of the Fourteenth Amendment rights of the father and the unborn child?

2. Is an order enjoining an abortion of an unborn child, entered at the request of the natural father during the first trimester of pregnancy violative of the Fourteenth Amendment due process rights of the fetus' mother?

3. Is the unborn child a person who enjoys rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution of the United States?

4. Does the scope of a woman's Fourteenth Amendment Right of Privacy, include a decision whether or not to terminate the life of an unborn child in circumstances where her own life is not in danger and the pregnancy is not the result of rape or its equivalent?

5. Is the nature of a woman's Fourteenth Amendment Right of Privacy, where that right legitimately encompasses a woman's decision to terminate the life of her unborn child during all three trimesters of pregnancy, a "fundamental" constitutional right, when the woman's life is not in danger and the pregnancy is not the result of rape or its equivalent?

6. Does the unborn child enjoy due process and equal protection rights under the Fourteenth Amendment which include that child's right to have his or her own natural father extended legal standing to assert the unborn child's constitutional rights?

7. Is the natural genetic father of an unborn child the individual possessing standing to raise the constitutional rights of the unborn child under the Fourteenth Amendment and does his standing rest upon his own constitutional rights, including:

   a. The natural father's Fourteenth Amendment Constitutional right to association and companionship with his child?

   b. The natural father's constitutional right to procreate?

   c. The father's constitutional right to discharge his moral and legal obligations to his children and protect them?

   d. The father's constitutional right to equal protection of the laws where denial of his participation in deciding the future of his child is based upon classification by gender?

   e. The cumulative weight of his own constitutional rights?

8. Where the state acts to enjoin a mother from having an abortion during the first trimester of pregnancy to protect the life of the unborn child, what is the correct standard of review of the state action: rational basis; strict scrutiny requiring a compelling state interest; undue burden or some other standard?

9. Is a determination by the State of New Jersey that the unborn child is a person throughout pregnancy (including the first trimester) to whom the State provides protection from abortion violative of the Fourteenth Amendment due process rights of the child's mother?

LIST OF PARTIES

J.M.[1], petitions the Court in his appointed capacity as Guardian Ad Litem of his unborn child. J.M. pled the case, in part, in that capacity, and was appointed as Guardian Ad Litem by the Chancery Division of the Superior Court of New Jersey. J.M., files this Petition under 28 *U.S.C.A.* §1257(a).

At the same time of the filing of this Petition, J.M.[2] has filed a separate Petition in his individual capacity asserting his own constitutional rights. The New Jersey courts have treated the petitioner as two separate parties in the same case.

The Respondent is V.C., the mother of the unborn child. V.C. was represented below by the American Civil Liberties Union Foundation, 132 West 43rd Street, New York, New York 10036; The National Organization of Women Legal Defense Education Fund, 99 Hudson Street, New York, New York 10013; and Stryker, Tams & Dill, 2 Penn Plaza East, Newark, New Jersey

[1] J.M. and V.C. are the initials of the plaintiff and defendant whose full names, addresses and identities were disclosed to the court, but the parties were ordered by the Appellate Division of the Superior Court of New Jersey to proceed with the initials only to protect the privacy of the litigants.

[2] Hereinafter we refer to "J.M. individually" in relation to the claim in which J.M. asserts his personal rights, and "J.M. a guardian" in relation to the claim in which J.M. asserts the rights personal to the unborn child.

07105. The second defendant, W.M.C. is a hospital where V.C. had scheduled the abortion of the child. Because W.M.C. did not appear in the action and expressly stated that it would not participate at any stage of the proceedings, W.M.C. is not designated as a Respondent in this Court.

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ORDERS AND OPINIONS DELIVERED IN THE CASE

The following is the list of Orders and Opinions delivered in this case in chronological order:

	DESCRIPTION OF ORDER	FOUND AT
1.	Order of the Chancery Division of the Superior Court of New Jersey dated March 9, 1992 issuing temporary restraints enjoining V.C. from aborting the unborn child of V.C. and J.M.	67a to 72a
2.	Order of the Appellate Division of the Superior Court of New Jersey dated March 13, 1992 directing use of parties' initials only	73a
3.	Order of the Chancery Division of the Superior Court dated March 19, 1992 continuing the restraints against V.C. enjoining an abortion in favor of J.M. as Guardian Ad Litem and ordering dismissal of the Complaint brought by J.M. individually . . . . . (See transcript at 77a, 78a, 80a to 92a)	97a - 98a
4.	Order and majority opinion of the Appellate Division of the Superior Court (decision by two to one vote) dated March 23, 1992 dissolving the injunction, but declining to review the claim of J.M. as guardian, or J.M. individually	99a to 102a
5.	The dissenting opinion of Appellate Judge, Hon. Thomas F. Shebell, J.A.D., who would have held in favor of J.M. in both capacities . .	103a to 105a
6.	Order of the New Jersey Supreme Court dated March 24, 1992 dismissing the Complaint of J.M. as Guardian and vacating temporary stay of the App. Div. Order dissolving restraints	106a - 107a

7. Order of the Supreme Court of New Jersey dated March 24, 1992 denying J.M. individually leave to appeal the dismissal of his complaint .. 108a - 109a

8. The Order of the Supreme Court of New Jersey denying J.M.'s motion filed on March 31, 1992 as Guardian seeking reconsideration of the dismissal of the child's Complaint 110a, 111a

9. Letters from the Clerk of the Supreme Court of the United States stating that the Hon. David Souter and Hon. Clarence Thomas denied application for a single Justice Stay filed by J.M. as Guardian Ad Litem and in his individual capacity on March 25, 1992 ..... 112a, 113a

STATEMENT OF JURISDICTION

Petitioner seeks a Writ of Certiorari to review a final order of the Supreme Court of New Jersey (the highest court of that State) entered on March 24, 1992 (Petitioner's motion for reconsideration timely filed on March 31, 1992 was subsequently denied by that court). The Petitioner has consistently claimed rights under the Constitution of the United States and all constitutional issues raised in this Petition are raised in the briefs filed in the State courts. Accordingly, the Supreme Court of the United States has jurisdiction over this matter pursuant to 28 U.S.C.A. §1257(a).

STATEMENT OF CONSTITUTIONAL PROVISIONS

This Petition involves the following provisions of the Constitution of the United States:

1. The Fourteenth Amendment Due Process Clause which states: "Nor shall any state deprive any person of life, liberty or property without due process of law" U.S. Const. amend. XIV §1;

2. The Fourteenth Amendment Equal Protection Clause which states: "Nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, §1.

STATEMENT OF THE CASE

A. INTRODUCTION

This case involves a dispute between the two natural parents of an unborn child who planned quite different futures for their child: the father sought to preserve the life of his unborn child threatened by an abortion planned by the child's mother.

This is an abortion case which presents this court, for the first time, with the direct clash of the rights of the mother, the father and the child, implicating the definition, scope and nature of those rights, the required balancing of each, and the powers and duties of the State in protecting the rights of each, where the two natural parents disagree on the fundamental question of whether their unborn child should continue to live. It provides this court with the opportunity to definitively delineate the power and duties of the State to regulate and prohibit abortion.

B. PROCEDURAL HISTORY

The petitioner, J.M., instituted this action seeking an injunction preventing V.C., the mother of his unborn child, from obtaining an abortion and terminating the life of the child. He brought the action on behalf of himself, asserting his own constitutional rights, and also as guardian ad litem of the child, seeking to protect the child's rights. The complaint was filed in the Chancery Division of the Superior Court of New Jersey on March 9, 1992 (1a to 10a). In support of an application for temporary restraints enjoining the abortion, the plaintiff-petitioner submitted affidavits of J.M., Dr. Jerome LeJeune (a French geneticist) and Dr. Bernard Nathanson (a prominent New York Obstetrician and Gynecologist) (see 11a to 66a). Upon notice to the defendants V.C. and W.M.C., the Chancery Division entered the restraints enjoining the abortion until a return date of March 30, 1992 (see 67a to 72a).

On March 13, 1992, the Appellate Division of the Superior Court of New Jersey entered an Order directing the parties and the lower court to proceed using only the initials of the respective parties (see 73a). V.C., through counsel, appeared in the case and moved to dismiss the Complaint of J.M. individually, the Complaint of J.M. as guardian and dissolve the restraints. On March 19,

1992, the Chancery Court granted V.C.'s motion to dismiss the Complaint brought on behalf of J.M. individually, but denied the motion pertaining to J.M. as guardian of the unborn child. The court continued the restraints (see 97a to 98a; 77a, 78a, 92a). The court declared a need to resolve the question of "when life begins," stating that a resolution of that question is a prerequisite to determine whether the unborn child enjoys constitutional rights, and observed that the courts in New Jersey, have been called upon to make equally the difficult determination in defining when life ended (in the "right to die" cases) (see 81a to 92a).

V.C. immediately filed a motion with the Appellate Division seeking: (1) leave to appeal from the order of the Chancery Division refusing to dismiss the guardian's Complaint and summary reversal thereof; and (2) dissolution of the Chancery Division's restraining order. The plaintiff, J.M. individually, filed a cross-motion seeking leave to appeal the interlocutory order of the Chancery Division dismissing his Complaint. On March 23, 1992, the Appellate Division (Judge Shebell dissenting) granted V.C.'s motion for leave to appeal the injunction only and summarily reversed the Chancery Division, vacating the restraints. That court denied V.C.'s application for leave to appeal the Chancery

Division's refusal to dismiss the guardian's complaint. J.M.'s motion for leave to appeal the dismissal of his individual complaint was denied and was reviewed on its merits. The majority relied upon the U.S. Supreme Court rulings in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973) and *Planned Parenthood v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831 (1976) (see 99a to 105a).

In his dissent, Judge Shebell explained that he would not have vacated the restraints and would have reversed the Chancery Division's dismissal of J.M.'s individual complaint, stating:

> "The law pertaining to abortion is in a state of flux. See *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L.Ed.2d 410 (1989); *Planned Parenthood of S.E. Pa. v. Casey*, 947 F.2d. 682, 695, 698 (3rd Cir. 1991). The United States Supreme Court's holding in *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147 (1973), in the view of many, represents erroneous interpretation of the Constitution - inventing a constitutional right to an abortion, now exclusively in the mother....In this case, one of the recognized parents cries out for the right to "preserve" and thereafter "nurture" the child which the other seeks to irretrievably put beyond the reach of all courts. *Cf. Planned Parenthood of Cent. MO. v. Danforth*, 428 U.S. 52, 49 L.Ed.2d 788 (1976)...The courts ...perhaps even because of this very case, may recognize an unborn child's right to life, or at least, the right of both parents to be heard on the issue. I would, therefore, continue the restraints wisely imposed by the trial judge..." (see 103a - 104a).

The Appellate Division stayed its own order to permit both

parties to be heard before the New Jersey Supreme Court the following day, March 24, 1992. As a result of the orders of the Appellate Division, the Complaint of J.M. as guardian was left undisturbed, but the temporary restraints were dissolved. J.M. as guardian, individually, filed a motion in the New Jersey Supreme Court seeking leave to appeal from the interlocutory order of the Appellate Division dissolving the restraints. J.M. individually moved for leave to file an interlocutory appeal from the dismissal of his complaint. V.C. moved before the New Jersey Supreme Court seeking an Order granting leave to file an appeal from the interlocutory order denying a dismissal of the complaint of J.M. as guardian. That Court granted leave to V.C., entertained her appeal on the merits, and summarily reversed the trial court, dismissing the complaint brought by J.M. as guardian (see 106a, 107a). The New Jersey Supreme Court stated that it had "concluded that under current law" the plaintiff's proofs that the unborn child was indeed a human being, a person was irrelevant (106a).

The Supreme Court declined to grant leave to J.M. individually, stating that because the injunction was dissolved, his application was moot (see Supreme Court Order, 108a, 109a). The following day, March 25, 1992 single Justice Applications for a

Stay of the New Jersey Supreme Court orders were denied by Justice Souter and Thomas (112a, 113a). The plaintiff, J.M. as guardian now petitions the Supreme Court for a Writ of Certiorari within the ninety (90) day period prescribed by statute. J.M. individually files a petition simultaneously.

C. STATEMENT OF FACTS

(i) The Relationship of J.M. and V.C.

J.M., 38 years of age, met V.C., 32, in July, 1991. In September, 1991 the plaintiff first proposed marriage to the defendant. V.C., declined, indicating she would consider marriage in the future. In February, 1992, V.C. suspected she was pregnant (by J.M.). A self-administered pregnancy test proved positive for pregnancy and a repeat test in the presence of the plaintiff duplicated that result (see cert. of J.M. at 11a to 19a). On Monday, March 2, 1992, V.C. was examined by a physician in Monmouth County (N.J.) who confirmed that she was then 8 weeks pregnant. J.M. expressed his support to her, again proposed marriage, and indicated that he would discharge his obligations as father, whether or not they married or she felt capable of assisting in rearing the child. V.C. told J.M. that she was still unprepared for marriage and on March 4, 1992, V.C.

advised J.M. that she had decided to seek an abortion scheduled for the morning of Wednesday, March 11, 1992 at a facility located in Monmouth County (see cert. of J.M. 11a to 22a). After J.M. was unable to persuade V.C. to abandon her plans to terminate the life of the child, he retained counsel on Saturday, March 7, 1992 and instituted this action on Monday, March 9, 1992 (see 11a to 22a). In the certifications filed by J.M. with the court, he certified that he was prepared to raise the child himself. J.M. stated, however, that he recognized that once the child was born, V.C. may at that time change her mind and decide to be the primary custodian of the child. J.M. certified that he would not interfere with such wishes of V.C. nor would he contest to be the primary custodian if she made that choice. In the event V.C. changed her mind and chose to be the primary custodian, J.M. certified that he would live up to his obligations as father (whether they married or not) with financial support and visitation. The support J.M. offered V.C., therefore, included marriage, or in the alternative, his offer to raise the child alone or in combination with her, subject to her choice (see 11a to 22a).

Counsel for V.C. has represented that V.C. obtained an abortion terminating the child's life shortly after the New Jersey

Supreme Court Order of March 24, when the child was 11 weeks old. Had an abortion not been performed the child would be 24 weeks of age at the time this petition was filed.

(ii) Facts Pertinent to the Question of Whether Human Life Begins at Conception and evidence consistent with the conclusion that an unborn child can experience pain during an abortion.

The record contains eloquent and powerful testimony of Dr. Jerome LeJeune, M.D.[3] and Dr. Bernard Nathanson[4], M.D. Their

[3] Jerome LeJeune, M.D. is a world renowned geneticist currently teaching at the University of Paris, France. He has one of the largest consultation practices in the world for mentally retarded children with difficulty due to chromosomes mistake (examining over 2,000 children each year and maintaining records of 30,000 children over his lifetime) (see 36a to 40a). Among the many of his life's achievements, includes Dr. LeJeune's discovery of Down's Syndrome and its causes due to an "excess of genetic material" consisting of the extra chromosome, now known as No. 21. Dr. LeJeune has been credited with the first discovery of a chromosomal abnormality in man (see 35a to 38a, 42a, 43a). In his work Dr. LeJeune attempts to understand the nature of every human being and how and why they are inflicted by "constitutional difficulty" (40a) in an effort to find the means to correct the illnesses. As a result of Dr. LeJeune's prominence in the field of genetics, he was selected as a representative of France as a member of the United Nations Scientific Committee concerning the danger of atomic radiation. While serving on the Scientific Committee at the United Nations he also became Vice President of the United Conference in Moscow. In addition he was a member of the Pontifical Academy of Science and is a member of a special group that studied the damage of atomic war. He was requested by Pope John Paul II to travel to Moscow to speak with Mr. Brezhnev on behalf of the Vatican. He was the first to give a course on human genetics at the California Institute of Technology (40a to 43a).

[4] Dr. Bernard Nathanson is an accomplished obstetrician and gynecologist from New York City, educated at Cornell University and McGill University Medical College in Montreal, Canada. He was board certified by the American Board of Obstetricians and Gynecologists in 1960 and is currently an attending obstetrician and gynecologist at St. Vincent's Hospital in New York; St. Luke's Roosevelt Hospital, part of Columbia University College of Physicians and Surgeons; and New York Hospital Cornell Medical Center. Dr. Nathanson has published

testimony and supplementation explains new knowledge of science, technology and medicine which bear upon the factual and legal considerations in this case (see Point II below). It supports three separate and pertinent conclusions: (1) The life of a specific individual human being is a seamless continuum that commences immediately upon conception and the individual is complete with all genetic material specifically programmed for all future development and growth; (2) The individual is complete not only as to species but the unique identity of the specific member of the human race is complete immediately upon conception; (3) There is new scientific evidence which supports the conclusion that the unborn child is capable of experiencing pain during the second half of pregnancy and is consistent with the conclusion that the child may experience pain in the first trimester (Point II, Section C). There are a great many advances in science and medicine which bear upon the factual and legal aspects of when life begins. Man's knowledge of science and medicine has advanced to the point

numerous scientific articles and several books in the area of bioethics, fetal development, embryology and fetology. He lectures in these areas and holds professorships at two universities. Dr. Nathanson probably has more experience in abortion technology than anyone in the Country, having been the director of the largest abortion clinic in the United States for two years, his research and publication in medical literature, his scientific papers on the techniques of abortion and his study of complications of abortion related issues (59a to 66a).

where reexamination of this information is required.[5]

D. JUSTICIABILITY

Although the defendant represents that the child's life has been terminated, this case still represents a justiciable controversy. Based upon the principles annunciated by the U.S. Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973), the case presents a justiciable controversy because at the time the complaint was filed and for sometime thereafter it clearly presented a case and controversy. In *Roe* The court concluded that pregnancy litigation provides a classic justification for a conclusion of nonmootness because it truly provides a situation that is "capable of repetition, yet evading review". *Roe v. Wade* at 410 U.S. at 124, 93 S.Ct. at 712.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. THE SUPREME COURT OF NEW JERSEY DECIDED EX-

[5] We observe that this court has already received amici curiae briefs in prior abortion cases which address medical and scientific considerations. *Webster v. Reproductive Health Services* dated March 30, 1989. The Brief of the American Medical Association, American College of Obstetricians and Gynecologists, et al. in support of appellees, *Webster v. Reproductive Health Services* dated March 30, 1999. If the Supreme Court granted J.M.'s petition in this case, petitioner, with the assistance of accomplished geneticists, biochemists and medical doctors would supply the court with additional scientific data and information. There is little doubt that members of the scientific and medical community who supports the position of V.C. would also make submissions to this court.

TREMELY IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, RESOLVED BY THE UNITED STATES SUPREME COURT.

When the New Jersey Supreme Court entered its Order on March 24, 1992 dismissing petitioner's complaint and refusing to recognize the right of a father and child to obtain the injunction to preserve the child's life, the New Jersey Supreme Court decided constitutional questions that the United States Supreme Court has never decided: That when a father and his unborn child assert their own rights and interests and appeal directly to a state court to protect each, a State has no constitutional obligation to recognize and protect the life of the unborn child.[6]

This case presents legal issues involving abortion rights in a context quite different than all of the prior reported decisions of this Court. It is not a case which seeks to balance interests of the state against those of a private citizen, but presents, for the first time, a direct conflict between the individual rights of the mother and those of her child and the child's father who seek to protect their own rights and interests. Consequently, it implicates quite

[6] Under current New Jersey Law, a mother may have an abortion resulting in the termination of the child's life even to the end of the last trimester of pregnancy. See discussion below.

different interests and rights which have never been directly addressed by the United States Supreme Court.

In *Planned Parenthood of Cent. Mo. v. Danforth*, 420 U.S. 52 96 S.Ct. 2831 49 L.Ed.2d 788 (1976) (hereinafter *"Danforth"*), the U.S. Supreme Court reviewed a provision of a state statute which required spousal consent. But that case did not address the interests or the issues presented by this one. In *Danforth*, the majority (by Justice Blackman) reviewed the statute in a rather limited context of a state's interest to protect the "perception of marriage as an institution." That case did not even implicate a state's legitimate interest in protecting life or potential life. This case involves the legitimate interest of a father to protect his child's life, and the child's own interest in life. In fact, the majority opinion did not even address the question of whether a father has any constitutional rights at all, because those rights were not implicated. *See, 428 U.S. at 54 - 84, 96 S.Ct. at 2834 - 2848.* The majority analyzed the entire question from the point of view of the limited state interest and the ability of the state to delegate its own interest to an individual citizen. It did not address the question of whether a father himself had any constitutional rights to protect the life of the child.

In the present case, the child's rights and the father's rights are directly implicated for the very first time. In *Danforth*, five Justices (Justices Stewart and Powell in a concurring opinion, and Justice White, Chief Justice Berger and Justice Rehnquist in a dissent) disagreed with the majority's narrow approach and argued that the father's own constitutional rights were indeed implicated. All five found that he had constitutional rights, and a majority of those (Justice White, Rehnquist and Chief Justice Berger) found that the father's rights, when balanced against those of a mother, would require a State to preserve the father's rights. But the majority did not reach the issue of the father's rights (or the rights of the child) because the statute under review dealt with a man's status as spouse, not status as father. One was seen as quite different from those of the other.[7] In *Danforth*, therefore the Court did not rule on the questions presented by this case. The question of whether the child's life could be protected by the father based

[7] In this case the father, in his individual capacity, asserts four separate and distinct constitutional rights: the right to association and companionship with his child; his right to procreate; his constitutional right to discharge his obligation and duties to his child; and his right to the equal protections of the law. See Point III below; Justices White, Rehnquist and Chief Justice Berger base their 1976 dissent upon a father's constitutional right to association and companionship; Justices Powell and Stewart cited the father's constitutional right to association and a separate right to procreation. The law is more highly developed at the present time and support the four asserted constitutional rights of the father.

upon his own rights or those of the child was left unanswered.

This case also presents questions concerning the rights of the unborn child which have never been decided by the U.S. Supreme Court. No reported decision of this court has resolved a dispute directly involving the child whose interests were represented by a guardian and consequently the Supreme Court has never answered the question of whether a state must recognize the rights of the child when a child seeks to protection. Nor has the court ever answered the question of whether a State must exercise its power to protect the life of the unborn child at the request of either the father or child. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973) and its progeny established the clear principle that the state has a compelling interest in protecting the life of the unborn child in the third trimester of pregnancy.[8] *Roe* does not answer the question of whether there are circumstances under which the state must exercise its power (especially where there is a direct conflict) to protect the life of the child. *Roe* specifically observed that it did not address the rights of a father, which necessarily

[8] The recent case of *Webster v. Reproductive Health Services, 492 U.S. 490, 109 S.Ct. 3040 (1989)* finds the compelling nature of the state's interest is present throughout pregnancy. See Point III below.

include a father's role in acting to protect the life of the unborn child, especially where a particular state refuses to exercise its recognized power to protect life. Id.

In the present case, the New Jersey Supreme Court refused to recognize any interest of the child, the father or the father on behalf of the child, even where the mother's life or health was not in danger and not the result of rape.

The current state of New Jersey law permits a mother to abort her child at any time up to the moment of birth for any reason. Prior to *Roe, supra,* New Jersey's policy was clearly anti-abortion and chose preservation of life over the destruction of it.[9]

[9] *N.J.S.A. 2A:87-1.* To preform an abortion was a high misdemeanor which brought a criminal penalty of up to fifteen years of incarceration. *See New Jersey v. Novak, 22 N.J. 231, 121 A.2d 521 (1956); New Jersey v. Siciliano, 21 N.J. 249, 117 A.2d 490 (1956); New Jersey v. Colmer, 45 N.J. Super. 236, 122 A.2d 325, (App. Div. 1957).*

In recognizing that adults have legal obligations to an unborn child in utero and establishing legal liability on the part of physicians to a child prior to birth, the Supreme Court of New Jersey recognized that the unborn child was a separate person and the "child" is in existence from the moment of conception. *Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 at 362-364 (1960).* In *Smith v. Brennan,* the New Jersey Supreme Court stated that:

> "Medical authorities have long recognized that a child is in existence from the moment of conception and not merely a part of its mother's body." 31 N.J. at 362...It is clear medical authorities recognize that before birth an infant is a distinct entity and that the law of the land recognizes that rights which he will enjoy when born can be violated before his birth." 31 N.J. at 364.

In *Raleigh Fitkin - Paul Morgan Memorial Hospital v. Anderson, 42 N.J.*

Following the U.S. Supreme Court decision in *Roe v. Wade* in 1973, the strong anti-abortion policy in New Jersey was superseded and the law evolved to a point of a total lack of recognition of the rights of the child and father. The New Jersey criminal abortion statute was not repealed until 1978, made effective in 1979. See *supra* text accompanying note 9. Prior to the legislature repealing the abortion statutes, the New Jersey Supreme Court twice construed the criminal statute following *Roe*. In *State v. Norflett*, 67 N.J. 268, 337 A.2d 609 (1975), the New Jersey Supreme Court upheld the New Jersey Criminal Abortion Statutes. Two years later in 1977 the New Jersey Supreme Court held that

421, 201 A.2d 537 (1964), the New Jersey Supreme Court found that the state had an interest in protecting the life of an unborn child. The court found that that right was personalized to the life of the unborn child and the court appointed a guardian ad litem. 42 N.J. at 423, 424. The health of the child was protected while the child was in the mothers womb even over the objection of the baby's mother.

In *Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967)*, the New Jersey Supreme Court specifically stated that abortions were against the public policy of the State of New Jersey. In refusing to recognize the life of a mother to sue a doctor in medical malpractice for denying her an opportunity to obtain an abortion in a state where it was legal (because the child had downs syndrome) the New Jersey Supreme Court stated:

> "The right to life is inalienable in our society...we are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of a single human life is the decisive factor...(that) it may have been easier for the mother and less expensive for the father to terminate the life of the child while he was an embryo, but these alleged determinants cannot stand against the preciousness of a single human life...49 N.J. at 30, 31.

the *Roe v. Wade* decision was not to be applied retroactively. *Planned Parenthood of New York City, Inc. v. New Jersey*, 75 N.J. 49, 379 A.2d 1289 (1977). After the legislature completely repealed criminalization of abortion even in the third trimester, the New Jersey Supreme Court, in 1979, reversed its decision in *Gleitman v. Cosgrove*, by its opinion in *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979), thereby extending to a couple a civil cause of action against a physician in the so-called "wrongful birth" cases. In 1984 the New Jersey Supreme Court extended the wrongful birth cause of action even to the child following birth. *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755, (1984). By totally repealing the criminal abortion statute, New Jersey placed no restrictions on third trimester abortions. *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982) found that the New Jersey Constitutional right to equal protection required state funding of all therapeutic abortions. Although the New Jersey Supreme Court has never grounded the abortion right in the New Jersey State Constitution, that has been the position of the A.C.L.U. representing V.C. in this case. V.C. also maintains that in New Jersey a woman has an absolute right to an abortion up to the moment of birth. After 1979 there are no New Jersey cases which recognize that the

child has any rights which could be balanced against any interest of the mother. Although the petitioner has argued to the New Jersey courts that current federal constitutional law permits New Jersey to return to its policy prior to *Roe*, the New Jersey Supreme Court rejected that course, refused to recognize any rights in the father and the child and leaves both unprotected throughout pregnancy. That New Jersey can refuse consistent with the Fourteenth Amendment to enforce the rights of the father or the child, when their interests are directly implicated, has never been decided by the U.S. Supreme Court and the Court should grant petitioners writ for certiorari on that basis.

II. RECENT DEVELOPMENTS AND DISCOVERIES IN SCIENCE AND MEDICINE PROVIDE A LARGE BODY OF NEW FACTUAL DATA AND INFORMATION RELEVANT TO THE QUESTIONS OF WHEN THE LIFE OF A HUMAN BEING BEGINS AND THAT THE UNBORN CHILD EXPERIENCES PAIN DURING ABORTION, REQUIRING REEXAMINATION OF THE LEGAL QUESTION OF WHETHER AN UNBORN CHILD POSSESSES CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT.

A. INTRODUCTION-LEGAL PRINCIPLES SET FORTH IN *ROE*

In *Roe v. Wade*, the United States Supreme Court concluded that Texas' imposition of criminal penalty for abortions was not justified based upon that "state's determination to recognize and protect prenatal life from and after conception constitut(ing) a

compelling state interest." *Roe* decided that a State's interest in protecting the life of an unborn child is compelling only in the third trimester of pregnancy. 410 U.S. at 163, 164 S.Ct. at 732. Changes in the law[10] and significant recent developments and discoveries in science and medicine require a thorough re-examination of Section IX(A) and IX(B) of *Roe v. Wade*.[11] The conclusion of the Supreme Court that a state's interest in protecting prenatal life was compelling at one stage but not at another involved two general inquiries that were separate yet inextricably connected: (a) whether the Fourteenth Amendment provided an unborn child Federal constitutional protection as a person under the Due Process clause; and (b) when does the life of a human being commence to justify legal protection. Two important statements that were made now require scrutiny:

> (1)"...The word 'person', as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158, 93 S.Ct. at 729; (2) we need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to ar-

[10] Discussion of recent changes in the law are reserved for Point III below which addresses New Jersey misinterpretation and misapplication of the current law. This point is confined to the developments in science and medicine.

[11] 410 U.S. at 156-162, 93 S.Ct. at 728-731.

> rive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." 410 U.S. at 159, 93 S.Ct. at 730. (emphasis added)

The combined treatment of these inquiries resulted in the Court adopting the trimester system, which appears to have been since discarded by the court as a consequence of *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040 (1989) (see discussion under Point III below).

The question of whether an unborn child is a person who enjoys constitutional rights under the Fourteenth Amendment is a legal one, but one which contains within it an important factual component. Science and medicine are currently able to provide data and information pertinent to the factual considerations far beyond that contributed in 1973. The legal inquiry, simply put, is whether the human life with which we deal does or should enjoy rights under the Fourteenth Amendment at any or at all stages of development between conception and birth (recognizing that children who survive birth range in age from twenty-three weeks to forty weeks post conception). By suggesting that science and medicine can establish when the biological life of a person begins is not to suggest that the court should defer to science. Quite to the

contrary, if the members of the scientific and medical community themselves state that they cannot reach a consensus, that fact does not bear upon the need of the court to reach the legal conclusion which, by its nature, includes the fact question. The ultimate judgment, being a legal one, may be arrived at in consultation with science. By reaching a legal conclusion concerning which human beings and at what age of development enjoy constitutional rights the court makes the judgment of when life begins because the practical consequences of the judgment necessarily include the factual considerations.[12] Expressly stated or not that is really the motivating force which gave birth to the trimester formula: what we knew weighed against what we were not sure of.

There can no longer be serious doubt about when the life of a new human being begins (see Point II Section C). That some members of the scientific community might postulate that there is

[12] While we sincerely empathize with the sentiments expressed by Justice Scalia in his concurring opinion in *Cruzan v. Director, Missouri Department of Health, 110 S.Ct. 2841 at 2859 (1990)*, there are certain issues, even concerning life and death, that only the nine justices of the United States Supreme Court have the power to determine, the only consolation being that the rest of us will bring to them their thoughts, abilities, arguments and knowledge. When a state completely fails to protect the life of a human being, even a human being yet born, and that state's failure to act may result in a painful, brutal death of a member of the human race (ignoring the constitutional rights of one of the natural parents) there is nowhere left to appeal but the United States Supreme Court.

no consensus on when life begins, indeed some have so stated to this Court[13] does not contradict reliability and wide spread acceptability of the relevant scientific information. To state, concerning the proposition that "life begins at conception", that individual scientists will have individual answers based upon their individual "values and beliefs, fails to answer the real inquiry.[14] That statement suggests that the individual scientist is offering a value judgment rather than stating factual knowledge shared by the scientific comments. The argument that the statement "life begins at conception" goes "far beyond the realm of medical science, and into social, religious, philosophical, ethical and moral concerns,"[15] explains, why there is no recognizing "consensus" when there is virtual universal acceptance of the important facts: The individual scientists inject their personal religious, moral and social bias into their answer. Based upon the scientific factual data the human is biologically complete at conception. That some scientists personally prefer to give that human life no value

[13] See amici curiae of "167 Distinguished Scientists and Physicians, Including Eleven Nobel Laureates, In Support of Appellees (*Webster v. Reproductive Health Services 1988*), p.3-7).

[14] Id. at 4.

[15] *Id. at 6.*

expresses a view which does not lie within their domain and it merits no more consideration than the view of those from non-scientific disciplines.

This is precisely why the lack of a consensus among science and medicine is an irrelevant legal inquiry; when human life begins is truly a legal question. It is a legal question that encompasses factual questions scientific and medical in nature, as well as ethical and moral concerns.[16] It is the promise of the law, especially constitutional law, to balance the relative harms conduct has on individuals. Legal questions often encompass these moral and ethical considerations. Oliver Wendell Holmes once observed:

> "The law is a witness and external deposit of our moral life. Its history is the history of the moral development of the race."[17]

The court's have been compelled to reach a legal conclusion on when "life ends" even when medicine had difficulty reaching a consensus on the issue. *Cf. In re Quinlin*, 70 N.J. 10, 355 A.2d

[16] That the scientific and factual data is relevant to the inquiry and that the moral and ethical concerns are surely relevant is an observation with which we can't dispute. Although religious beliefs may account for the fervor with which some feel compelled to speak out on the issue, they are not the precise type of consideration upon which legal principle can be based.

[17] Oliver Wendell Holmes, Jr., *The Path of the Law, 10 Harvard Law Review, 457 (1897).*

647 (1976). The court in determining the difficult question of when protectable life begins, must consult with science to determine when the actual life of a human being begins as part of that inquiry. In *Roe*, in concluding that the State did not have a compelling interest to protect the life of the unborn in the first two trimesters, the court found that it was "persuaded" that the word "person" as used in the Fourteenth Amendment did not include the unborn. 410 U.S. at 158, 93 S.Ct. at 729. To reach this statement the court primarily relied upon a review of those clauses in which the word "person" appeared. This aspect of the court's discussion was unsatisfying because it ignored the context of the equal protection clause contained within the Fourteenth Amendment, ratified in 1868. Two clauses that the court noted as containing the word "person" were the Fifth Amendment Due Process Clause and Article IV, §2, clause 3 (fugitive slave clause). The Fifth Amendment extends due process to any "person." The fugitive slave clause used the term "person" to individuals who did not enjoy liberty within the slave states. It would appear that the term when used in Article IV, ratified in 1787, and the Fifth Amendment Due Process Clause, ratified in 1792, was an all inclusive term because it included natural persons who enjoyed constitutional

protections and natural persons who did not enjoy liberties but were subject to slavery laws. An argument could be made that the word "person" includes all members of the human race, all human beings. However, in determining whether the word "person" as used in the due process clause, which was ratified in 1868, could have been intended to include some classes of human beings but not others (which is what the *Roe* court would have to infer if it reached its conclusion independently of the fact intensive inquiry into the question of when life begins) the court should have construed the due process clause in *pari materia* with the equal protection clause (introduced to the constitution for the first time in the Fourteenth Amendment). The Fifth Amendment did not include equal protection language. The equal protection clause forbids denial to "any person within its jurisdiction" the equal protection of the laws. To suggest that the word "person" as used in the equal protection clause (and therefore the due process clause) could contain within it classes of "persons" such that the clause would apply to some but not to others, would constitute an inherent contradiction which would render the equal protection clause totally meaningless and without consequence. Therefore, any legal inquiry into the legal question of whether the Fourteenth

Amendment protects an unborn child (and the meaning of the word "person") can only be conducted simultaneously with the *Roe* court's inquiry under Section IX(B) when the life of a human being (the life of a person) begins.

B. RECENT ADVANCES IN SCIENCE, TECHNOLOGY AND MEDICINE HAVE BROUGHT THE CURRENT LEVEL OF MAN'S KNOWLEDGE TO A POINT WHICH REQUIRES A RE-EXAMINATION OF THE ROE COURT'S DISCUSSION UNDER SECTION IX(A) AND (B) OF ITS 1973 DECISION. THE RE-EXAMINATION OF THE *ROE* DETERMINATION IS ALSO REQUIRED FOR REASONS SET FORTH IN THE OTHER POINTS IN THIS PETITION.

Stare decisis is not a bar to the reexamination which we urge. Our research has disclosed one hundred and seventy-three instances in which the United States Supreme Court has overruled, in whole or in part, its previous constitutional decisions.[18]

Numbered among those on hundred seventy-three decisions is *Grosjean v. American Press Co.,* 297 U.S. 233 (1936), which

[18] The present compilation consisting of the 173 cases noted is based primarily upon the following authoritative sources: Justice Brandeis, dissenting in *Burnett v. Coronado Oil and Gas Co., 285 U.S. 393, 406-409 nn. (1932); Annette E. Wilson "Stare Decisis" Quo Vadis? 33 Geo. L.J. 251, 254, n. 17 265 (1945); William O. Douglas "stare decisis" 49 Colum. L.Rev. 735-743, 756-758 (1949); Albert R. Blaustein and Andrew H. Field, Overruling Opinions in the Supreme Court 57 Mich. L.Rev. 151, 184-194 (1958); The Constitution of the United States of America: Analysis and Interpretation, 1317-18, Lester S. Jayson, et al. ed. (1973). Payne v. Tennessee, 111 S.Ct. 2597, 2610, 2611 n.1 (1991).* For the complete list of cases, see the appendix immediately following this Petition.

expanded the definition of "person" as it was used in the Fourteenth Amendment Due Process Clause. Prior to the court's holding in *Grosjean*, the Court had ruled that a corporation was not a "person" within the meaning of the due process clause of the Fourteenth Amendment. *See Northwestern Life Insurance Co. v. Riggs*, 203 U.S. 243, 255 (1907); *Western Turf Association v. Greenberg*, 204 U.S. 359, 363; *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925). *Grosjean* is specific precedent of the U.S. Supreme Court which has expanded the class of "persons" to whom the Fourteenth Amendment Due Process Clause would apply.

Of particular relevance here is the now classic and often cited statement of Justice Brandeis contained in his dissenting opinion in *Burnett v. Cornado Oil and Gas Co.*, 285 U.S. 393, 405-413. Justice Brandeis there stated, in pertinent part:

> "The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the constitution...The controversy is usually over the application to existing conditions of some well recognized constitutional limitation. This is strikingly true of cases under the due process clause when the question is whether a statute is unreasonable, arbitrary or capricious; of cases under the equal protec-

> tion clause when a question is whether there is any reasonable basis for the classification made by a statute;...In every such case the decision, in the first instance, is dependent upon the determination of what in legal parlance, is called a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstances that the decision of that fact is made by a court instead of by a jury, should not be allowed to obscure its real character."

The question of whether an unborn child is a person to whom the Fourteenth Amendment should be applied is a mixed question of fact and law, and is precisely the type of determination, when man's knowledge becomes more expansive, of which Justice Brandeis speaks. After all, when the life of a human being commences, is, fundamentally a question of fact. The Brandeis analysis has been frequently cited with approval. See *Solorio v. U.S.*, 107 S.Ct. 2924, 2999 (1987) (expressly overruling *O'Callahan v. Parker*, 395 U.S. 250 (1969)); *United States v. Scott*, 98 S.Ct. 2187, 2199 (1978). *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 3067 (1989) (Blackman, J., dissenting) The scientific and medical information now available require a re-examination of the facts relevant to the question of whether an unborn child does or should enjoy the protection of the Fourteenth Amendment.

C. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES PROVIDE A LARGE BODY OF NEW FACTUAL DATA AND INFORMATION WHICH SUPPORTS THE CONCLUSION THAT: (1) THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION AND (2) THE UNBORN CHILD EXPERIENCES PAIN DURING ABORTIONS.

1. Introduction

Since the *Roe* Court commented upon the then current knowledge of mankind in 1973, there have been many scientific, medical and technological advances and discoveries, many in the last five years. These include the following: (1) Recombinant DNA Technology[19]; (2) DNA Probe Technology[20]; (3) Southern Blot[21]; (4) Northern Blot[22]; (5). DNA Mapping[23]; (6). DNA

[19] Methodology which (among other things) allows the production of a large amount of specific pieces of DNA which assists in DNA probe research.

[20] Use of pieces of DNA that are radioactively labeled to find a piece of DNA or RNA that is related in sequence. Among many other uses, it is a method which identifies the DNA or RNA that codes for "Substance P".

[21] The technology that combines the separation of molecules by electric charge and size with DNA probe technology.

[22] The technique that combines the separation of molecules by electric charge with size along with RNA probe technology for DNA.

[23] The process by which a map is made with guide posts of the DNA available in a particular sample (including chromosomes). The mapping is often accomplished by cutting the DNA molecule into pieces and then determining from where the pieces were derived.

Finger Printing[24]; (7). Polymerase Chain Reaction (PCR)[25]; (8). Monoclonal Anti-Body Technology[26]; (9) Hybridona Technique[27]; (10) Flow Cytometry[28]; (11) Improved Ultrasound Technology[29]; (12) DNA Methylation[30]; (13) Fetal Heart Monitoring[31];

2. The exploding Revolution of Molecular Biology has changed Man's knowledge of Developmental Neurobiology.

Since the decision of *Roe v. Wade* there has been a

[24] A procedure first demonstrated in 1985, whereby DNA probes to minisatellite regions of human DNA are used to provide a complex Southern Blot pattern. The procedure is finding increased usefulness in forensic science and legal medicine as it provides a test for relatedness between samples of DNA (extracted from human tissue). used in conjunction with the PCR technique such comparisons can be done on as little as one cell from each source.

[25] PCR - a test-tube method of amplifying DNA sequences hundreds of millions to billions of times invented in late 1984 and 1985 and can be used to obtain information from a single cell.

[26] Antibody preparation which contains only single type of antibody molecule.

[27] Used to produce human specific antibodies and in the detection of Substance P and other human proteins or peptides.

[28] A technique by which cells in suspension, often marked with fluorescent monoclonal antibodies are intercepted by a beam of light (a laser is often used) the interaction produces signals which drive a cell sorting apparatus which sorts and counts cells based upon a desired property. The technique is being used to completely remap the nervous system and for prenatal diagnosis with fetal cells isolated from maternal blood.

[29] Vastly superior technology which permits observation of the fetus at early ages of gestation.

[30] Modification of DNA so that it is recognized as different.

[31] Device which creates the ability to observe the operation of the human heart of the fetus at early stages of development.

revolution in the biological sciences brought about by the development of the new scientific technology. A field generally known as molecular biology has come to dominate biological investigation. This technology, together with the production of monoclonal antibodies and very recent developments in modern protein chemistry and electrophysiology, is applied to questions pertaining to developmental neurobiology. During the mid-1980's these techniques began to give insight into the development of the central nervous system. Early results of the application of the technology pointed to the fact that the classical histological and functional criteria for finding neuronal cell types was oversimplified. Fischbach G.D. *An Introduction to Molecular Approaches in Studies of Neuronal Development and Synapse Formation, In Molecular Neurobiology In Neurology and Psychiatry*, N.D. Eric R. Kandel, Editor, 1987, Raven Press, New York, p.143-153.

The presence of peptides (the hormones) of the endocrine system were well known in 1973; but since then the presence of similar substances have been discovered in nerve fibers. This discovery of more than thirty neuropeptides[32] was described in

[32] A small amino acid containing molecule. There are thirty which are associated with nerves and neuro transmission.

1985 as a recent and revolutionary discovery. Ballesta J., et al. *Distribution and Localization of Regulatory Peptides*, Crit. Rev. Clin. Lab. Sci. 1985, 22: p.185-218. These neuropeptides include "substance p" and "enkephalin". In 1973 science did not understand the function of substance p or its association with pain. Information to date point to a very complex process of interacting peptides, receptors, modulators, ion channels, among other things. Their discovery was a direct result of new immunocytochemical techniques used in conjunction with radioimmunoassay, technologies developed and markedly improved since 1973.

The origin, development and extensive use of molecular biological techniques since 1973 has changed the way in which modern biology is carried out. Using recombinant DNA technology (Watson, J.D., et al. (1983) *Recombinant DNA: A Short Course*, W.H. Freeman, San Francisco) and monoclonal antibody technology (Campbell, A.M. (1985) *Monoclonal Antibody Technology*, In Laboratory Techniques and Biochemistry and Molecular Biology, edited by R.H. Burdon and P.H. Van Knippenberg, Elsevier, Amsterdam) scientists now have the ability to explore biological information at the molecular level. The DNA technology includes such techniques as DNA probe technology, DNA cloning, southern

and northern hybridization techniques, DNA mapping technology, the use of restriction endonuclease enzymes, and gene amplification using the polymerase chain reaction (PCR). Using DNA probe technology combined with the southern hybridization technique, for example, scientists are able to detect the presence or absence of specific genetic material in a sample of tissue. When these techniques are combined with PCR (Arnheim, N., et al. *Application of the Polymerase Chain Reaction to Organismal and Population Biology*, Bioscience, 1990, 40:p.174-182; Arnheim, N., et al. *Polymerase Chain Reaction*, in Chemical Engineering News 1990, p.36-47) it is possible to identify the presence of specific genetic material in a sample as small as one cell. Holding C., M. Monk, *Diagnosis of Beta - Thalassemia by DNA Application in Single Blastomeres from Mouse Preimplantation Embryos*, Lancet, 1989, 11 p.532-5; Handyside, A.H., et al. *Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification*, Lancet 1989, 1: p.347-49. In practical terms, this means that investigators determine at a molecular level that a particular protein exists and whether a specific signal has been transcribed. Since *Roe*, technology developed allowing the production of human specific antibodies which helps determine whether a protein has been pro-

duced from specific genetic instruction. Martinis, J., et al. *Novel Applications of Monoclonal Antibodies*, Basic Life Sci. 1983, 25: p.129-154. These techniques, combined with immunochemistry technology, can be used to determine that a specific protein is present in a sample and can lead to a determination of where this specific protein exists. The cumulative affect of these new technologies is to demonstrate the rudimentary nature of the knowledge of science and medicine in 1973, when our knowledge concerning human development before birth was based upon gross morphological observations and biochemical studies on often heroic quantities of materials. In 1973 the scientists would observe a physical structure such as the cerebral cortex or dendritic spines. When a structure was not observable or was removed, the scientist could only observe what "appeared" to have happened. But the new technologies and techniques in molecular biology have enabled science to acquire and determine human developmental biological events before they can be seen as specific structures to gross morphological observations. It is now possible to examine proteins and the genetic construction to manufacture those proteins and can determine that not only the gross biology but the development at a molecular level. The technology has resulted in

information which demonstrates that previous assumptions may be incorrect. It has only been in the last ten years that man's knowledge has advanced to the point that it supports the conclusion that the unborn child experiences pain and provided evidence consistent with the conclusion that the unborn child is capable of feeling pain at a relatively early point in fetal development. At the time of *Roe*, it was believed that neonates could not feel pain. Fitzgerald, M., et al. *Pain and Analgesic in the Newborn*, Arch. Dis. Child, 1989, 64: 441-443. In addition, the new technologies have uncovered scientific information unknown only two to four years ago proving the complete nature and essence of the unborn child from the moment of conception.

3. Recent Developments and Discoveries in the Science of Genetics Support a Conclusion that the Life of a Human Being begins at Conception.

All of the genetic information and material necessary and sufficient for a particular human being exists at the moment human life begins at conception. When the head of the male sperm penetrates inside the female's ovum is the precise moment when the genetic information for the complete development of a unique individual human being is present. The information carried by the father encounters in the same recipient cell the information carried

or transmitted by the mother so that suddenly, almost instantaneously, a new constitution is spelled out in genetic terms and everything that is necessary to be a human being is present immediately after conception. (Testimony of Dr. Jerome LeJeune[33] (hereinafter "LeJeune") 26a, 27a); Moore, K.L., *Before We Are Born*, W.B. Saunders (1989) p.25, 26; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Either the whole information is present for conception of a human being for development to full stages of human growth, after the moment of the entry of the sperm into the ovum, or the genetic information is insufficient and no human being shall develop and conception will fail. LeJeune, 26a, 27a; Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584. Not only is it possible to identify

[33] Dr. LeJeune, a world renowned geneticists who provided testimony which is made part of the record of the present case. See n.3 at p.12 above.

the resultant cell after conception as being human the individual entity is known and can be identified. (LeJeune 27a). This new constitution is complete in all of itself, which is capable of being identified, capable of being read, and the makeup of chromosomes complete. We have, in short, a human being immediately after conception. (LeJeune 27a; Moore, *supra*, 26-28; Volpe, *supra*, 18-20).

In the process of fertilization is an extraordinary device employed by nature to protect the privacy of the life of the person immediately after conception - as if the right of privacy is written into the law of nature. The egg, a little sphere of one and one-half millimeters in diameter is protected by a transparent membrane (the zona pellucida) which completely covers the egg. Immediately upon a single sperm burrowing inside the zona pellucida, the transparent membrane suddenly becomes physically changed and within microseconds becomes completely impenetrable by any other sperm. (LeJeune 28a).

The necessary genetic information to create a human being is created in DNA, a long molecule. Physically, it is analogous to a minute flat ribbon of tape that is used in a tape recorder. Inside the head of a sperm is a long thread of one meter or so which is so tightly coiled in twenty-three little pieces that the whole of its

volume can be put on the point of a needle. It is twenty-three pieces of chromosomes. The ovum also contains twenty three chromosomes. In addition, inside the ovum there are billions of molecules specialized which will recognize and be recognized by the signals given by the RNA in protein constituting the genetic makeup. The information provided by the male sperm is approximately fifty billion bytes of information. However, the information contained inside the egg is much greater, so much so that it is presently uncountable so that the greatest computers cannot hold the amount of information that is inside one reproductive cell once fecundation occurs. (LeJeune 28a, 29a).

The interaction of the biological components can be analyzed to the process of a tape recorder which plays music. When a mini cassette on which the music of an artist such as Mozart is recorded and placed into a tape recorder, one experiences the sound of a symphony. The tape itself has no notes or music, and there are no musicians. Because there is a special code written on the tape, information is conveyed in such a way that the tape recorder will read it and make air move through a loud speaker. What is experienced by a listener is not an orchestra, not musicians, not evidence of music, but the genius of the author. That is how life

is played: inside the egg which receives the tape band from the father which has its own tape bands, there forms a sort of table or law of life. Within the egg is a tremendous amount of information to be received and interpreted. The genetic information necessary to form the completed human being is not only the long ribbon of DNA (which through the analogy is the mini cassettes of the symphony), but information in the cell itself, which reads it. The cell is an analogous to the magnetiscope of the tape recorder and possesses within it enormous information. (LeJeune 29a, 30a).

Approximately six years ago, an englishman, Alec Jeffreys, discovered and developed a technique which has the capabilities of determining the identity of a particular human being. Jeffrey discovered that in part of the chromosomes, the DNA is repetitive. It can be repeated as much as one hundred times. Jeffreys developed a method of extracting DNA and a technique for examining it. The technique creates the ability to record unique traits of the individual being examined. Jeffreys' method can be used to prove that each person is unique and that the sequence of the bars that he is able to identify is absolutely typical of and specific to the person being examined. That the identity of the person or the individualization of the member of the human race

takes place at conception can be confirmed by the Jeffreys method. (LeJeune 30a, 31a); Jeffreys, et al. *DNA Fingerprints and Segregation Analysis of Multiple Markers in Human Pedigrees*, Am. Journal of Human Genetics, 39:11-24 (1986); Honma, M., et al. *Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing*, Human Heredity, 1990, 40:p356-362; Jeffreys, A.J., et al., *Principles and Recent Advances of Human DNA Fingerprinting*; DNA Fingerprinting: Approaches and Applications, edited by Jeffreys (1991).

Methylation of cytosine represents a very recent discovery which supports the conclusion that a human being is a complete person upon conception. It's significance was unknown four or five years ago. Recently discovered is that DNA is even more sophisticated than previously suspected and the messages are written letter by letter, piece by piece. DNA contains basic information with indications that some information must be read immediately and some at a later time. What is meant by the methylation process is that everything to make a particular human being exists at fertilization but is not read at the instant of conception. This discovery was never expected ten years ago and was never predicted: that, in fact, the father's genes underline instruc-

tions to immediately produce the membranes inside which the embryo will develop itself and to make the placenta which is the body by which it will take the nutrients from the vessels of the mother. That information is contained or underlined in the sperm, not in the mother's egg. The male genetic material, therefore, builds the membranes which becomes the shelter in the placenta which is the food gathering system. The female information acting in concert with the male information, provides the mechanism for the development of the parts of the physical anatomy. All of this information and the sophisticated directed mechanisms is contained in the first cell. The significance of this information is that it was discovered that it is definitely ruled out that there can be a genetic constitution made from one parent only. It is not possible in an egg to put two pronuclei from the mother only. It will not be a human being. It is absolutely required that in the first cell, there be the DNA underlined by methylation in the male way and DNA methylation in the female way. The extraordinary observation made is that the only cell in all of the life of a person in which those two methylation systems from father and mother are present inside one cell is the very first cell which gives life to a person. At each progressive stage of development this methylation is erased

and replaced and progressively cells learn by a cascade of reaction to specialize so that some cells will develop to form the brain, another to make the liver, another to make bone, etc. It has been learned, for instance, that the male way of "spelling" is obligatory for muscles, so that even in the female information from which muscles are built to be underlined in a paternal way. This understanding contradicts previous notions that fetal development occurs only through the mother. The child is a complete human being programmed for life from conception. LeJeune 31a, 32a; Chaillet, J.R., et al., *Parental-Specific Methylation of an Imprinted Transgene is Established During Gametogenesis and Progressively Changes During Embryogenesis, Cell,* 66:1-3 (77-83) 1991; Surani, M.A.H., et al. *Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryonic Genome, Cell,* 45, 127-136 (1986); Swain, J.L., et al. *Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting, Cell,* 50, 719-727 (1987)). It is the opinion of Dr. LeJeune that there is a completeness of the human being and his or her identity from the moment of conception. The essence of the human being is complete (LeJeune 33a, 34a, 35a).

4. The Stages of Growth of the Unborn Child is a Seamless Continuum from Conception to Birth; Advances in Medicine Pertinent to the legal Inquiry.

The english language is burdened with terms developed at times in the history of medicine when it did not possess the current level of knowledge. But the "stages of growth and development" of the new human being is a "seamless continuum" (see testimony of Dr. Bernard Nathanson[34] at 46a-50a). Immediately upon conception the "fertilized egg" has been referred to as the zygote. At three days the child has developed from a single cell to a sixteen cell individual termed "morulε". The term "embryo" connotes the developing human being from the morulus stage to about the end of the eighth week. The term "fetus" is used to describe the stage of the development from the end of the eighth week up to the time that the baby is actually delivered, whatever the age of the child at birth. The terms zygote, morula, embryo and fetus are only terms of development of the same human being just the same as the terms "infant", "child", "adolescent" and "adult" also describe different stages of development of the human being. (Nathanson 50a).

[34] See n.4 at p.12, above; 59a to 66a.

The crude ultrasound devices that were available in the early 1970's permitted limited access to knowledge of a child during the early stages of growth. "Real time ultrasound" was developed in 1976 and actually created a motion picture which could depict movement and function such as breathing, urination, swallowing and other functions of the human existence. This level of visualization permits diagnosis of the child's illnesses while in its mother's womb. Medicine can now watch how the child functions including such intricate detail as the operation of the tiny little valves of the heart as it flops up and down pushing blood. Abnormalities in things such as heart valves can be detected and rather sophisticated operations are currently performed on unborn children at four to five months. It was not until 1990 that the first book was published describing this sophisticated fetal surgery in which the mother is anesthetized, her abdomen surgically opened and the uterus incisioned. In these operations the amniotic fluid is suctioned out and the baby is actually removed from the mother's uterus while the baby is still attached by the umbilical cord. The baby's abdomen or chest (whatever bodily organ is defected) is incised surgically, repaired, and the child is replaced into the mother's uterus, the amniotic fluid put back around the baby, and

the mother repaired. The child is able to proceed through the pregnancy to, at, or near full term and these operations are done at relatively early stages of development of the child. (Nathanson, 51a, 52a). Medicine has also recently developed the electronic fetal heart monitor which permits sophisticated investigation of the fetus. The electronic fetal heart monitor tracks the fetal heart rate from moment to moment and it can detect reactions of the unborn child to such things as different types of music (Nathanson, 52a, 53a). At eight weeks of age a child is recognizable as a human being even to the naked eye, the brain has formed (the child's brain continues to form following normal birth through childhood and adolescence), and the brain is producing "substance P", which is the "chemical messenger for pain" (Nathanson, 53a; discussion on pain in subsection 5 below). The child functions in a very human way, excretes urine, and its heart beats regularly (since three weeks). The brain waves have been isolated and detected at eight weeks following conception.

The child is always a separate individual from the mother. Circulations are always separate. If the blood circulations do in fact mix, it could be lethal for the baby and even for the mother. This relationship is clearly disclosed by developments in immunolo-

gy. The white blood cells in the immune system of the mother are capable of recognizing and distinguishing the mother from the child. That is the principle reason why the immune system does not kill the organs of the mother. The white blood cells actually recognize parts of the mother as being her body. It also distinguishes a body that is not part of itself. If a foreign substance enters a person's body the white blood cells recognize it and immediately attack to expel it. When pregnancy progresses and the blastocyst implants, (when the child is eight or nine days old), chemical messages are sent to various systems in the mother and the immune system (the white blood cells included) galvanizes because it recognizes that there is a foreign body within the mother. A concerted immune attack is focused on the new human being and the objective of the immune system is to expel the foreign body. The unborn baby erects a defense against the attack. The trophoblast which constructs the placenta serves as an immunological wall. Most human beings survive the attack of the mother's immune system. Those which do not survive are expelled, which are referred to as "spontaneous miscarriages" (Nathanson, 53a-55a; Hegde, U.C., Immunomodulation of the Mother During Pregnancy, Medical Hypothesis; 35:159-64 (1991)).

5. Based upon New Scientific and Medical Information, the Unborn Child Experiences Pain During Abortion in the Third Trimester and the Evidence is Consistent with the Conclusion that an Unborn Child may Experience Pain even in the First Trimester of Pregnancy.

Dr. Bernard Nathanson has expressed the opinion that the unborn child experiences excruciating pain during abortion. A vivid description which Dr. Nathanson claims supports this conclusion is incorporated in a film of an actual abortion entitled "The Silent Scream" made in 1984. Recent discoveries discussed below, now provide scientific data and information which supports that contention. Dr. Nathanson describes the film of an abortion of a child at the stage of 8 weeks through the use of ultrasound technology. In the abortion, the doctor puts an instrument into the womb to dilate the cervix, the water is broken and the embryonic fluid is permitted to flow out. Then the doctor inserts a suction apparatus into the uterus. It can be seen that the baby moves away from the suction apparatus. The suction is turned on and a tremendous negative force is used to pull the baby from its living quarters. In the suctioning process, the arms and legs of the human being are being torn off and then subsequently the body is being ripped apart. Dr. Nathanson explained that the head of the

baby was too large to be suctioned out so the doctor took a polyp forcep to reach into the uterus to locate the baby's head and put the forcep around it and then close the forceps. The film, according to Dr. Nathanson, reveals that the child's head is actually crushed in the process. It is Dr. Nathanson's opinion that an abortion of an unborn child in the mother's womb subjects the human being to unimaginable agony and it ends the life of a person in a barbaric and bloody manner. In the film it can be seen, according to Dr. Nathanson, that the mouth of the young unborn baby is open. It is described as a dramatic, arresting moment and heart stopping moment. It can be seen that the child was grimacing and was evidencing pain and agony (Nathanson 55a-58a).

Studies being conducted as a result of new technology available have resulted in data and information from which we can conclude that the unborn child is subjected to great pain if an abortion takes place in the third trimester, and the evidence is consistent with the conclusion that an unborn child may experience pain during a first trimester abortion.

In the last six years modern science has examined the relationship of substance "p" and pain. Uddman, R., et al. *Peptide - Containing Nerve Fibers in Human Extracranial Tissue: A Morpho-*

logical Basis for Neuropeptide Involved in the Extracranial Pain?, (1986) 27:p.391-399. It has been found that one of the neuropeptides (substance "P"), an important excitatory transmitter of pain pathways, is clearly present in the human at five weeks post fertilization. Luo, C.B., et al. *Localization of Substance "P" and Enkephalin by Immunohistochemistry in the Spinal Chord of the Human Fetus*, Neuro Science (1988) 27 p.989-93. It is a pain transmitter and a neuromodulator in the primary cortical areas of sensorial integration. Manolidis, L.S., et al. *Substance "P" in the Acoustic Area of the Cortex During Neonatal Development and Maturation*, Actaotoaloryntol (1989) (Stockholm) 107:375-382. Substance "P" was found to be present in neuronal elements of the human cortex at eighteen weeks gestation (the earliest time point tested) (Mandolis, et al., *supra*, 1989). Others have found Substance "P" present as early as five weeks gestation and has been detected at all stages of development wherever examined from that point thereafter (Tam, P.A., et al. *Maldevelopment of Spinal Cord - Substance "P" in Spina Bifida*, Z Kinderchir, 1986, 641:p.206-8; Wadhwa, et al. *Substance "P" - Immunoreactivity In a Developing Human Retinogenicualte Pathway*, Neurosci. Let. 1988, 89:p.25-30; Paulin, et al. *Ontogeny of Substance "P" in the*

Digestive Tract, Spinal Cord and Hypothalamus of The Human Fetus, Regul. Pep., 1986, 14:p145-153. Substance "P" alone cannot be suggested to be sufficient for pain transmission. The involvement of neuropeptides in pain transmission was not known in 1973. Nor were they part of the discussion when science originally formulated a proposition that there was a need for a sensory cortex for pain perception.

It is a very important and recent observation, that, using immunohistochemistry techniques, substance "P" positive neurons and nerve fibers were detected at eleven weeks post fertilization, and enkephalin positive neurons and nerve fibers were detected at thirteen weeks post fertilization. The levels of substance "P" and enkephalin at twelve to fourteen weeks were comparable to levels of the full term baby. In 1990, as a result of this revelation using molecular biological techniques, researchers have stated that

> the importance of the early appearance of enkephalin and substance "P" neurons and fibers of the pain pathways in the major subnuclei connecting with the cardiovascular, gastrointestinal and respiratory functions in the human has to be stressed. [35]

[35] Yew, D.T., et. al. *Development and Localization of Encephalon and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience, 1990, 34 to p.491-8.

None of the significant techniques used in the Yew study were available in 1973 or significantly thereafter. Until recently, science was incapable of even formulating questions no less deriving answers concerning the role of chemicals in the transmission of pain. In fact, science had not even discovered the existence of most of those key chemicals when *Roe v. Wade* was determined. A recent review (1991) summarized the current state of understanding of the function and development of the brain in the developing human. Lagercrantz, H., et al. *Functional Development of the Brain and the Fetus in the Infant*, Lakartidningen, 1991, 8-8:p.1880-5. There the authors observe:

> "neuronal multiplication occurs mainly from the tenth to twentieth gestational weeks, after which no new nerve cells are formed, though neuronal arborization and the information and reorganization of synapses continues until adulthood...Somatosensory functions are developed at an early stage. The pain threshold is assumed to be lower in the fetus than in the adult. In man general fetal movements appear from the eighth gestational week and more complex movements such as sucking, swallowing and breathing during the tenth to twelfth gestational weeks. These movements are generated by neuronal networks." Lagercrantz, *supra*, 1991 at 1880-5.

Using gross morphological observations on cortical developments pro-abortion amici have pointed to 28 weeks as a point when the human fetal brain is capable of the same range of

neurological activity as the brain of a full term newborn (including presumably pain detection and response) (see amici curiae brief of 167 Distinguished Scientists and Physicians, including Eleven Nobel Lauriets in Support of Appellees '*Webster v. Reproductive Health Services*, et al. at p.14-16).[36]

However, the evidence that science is now uncovering is consistent with the conclusion that the unborn child is capable of experiencing pain before the twenty-eighth week and perhaps as early as the first trimester. It is currently questions that cortical involvement is necessary for pain perception. Boreus, L.O., *Pain in the Newborn-Pharmacodynamic Aspects*, Dev. Pharmacol. Ther. 1990, 15:p.142-48. In fact, one of the neurosurgical methods for controlling severe chronic pain is cortex ablation. These methods have provided some relief, but often the pain returns. Melzack, R., IV. *Comment: Sensory and Pharmacological Modulation of Pain*, Can. J. Physol. Pharmacol., 1991, 69 p.695-696. The scientific ability to understand pain conduction in the unborn child at early stages of gestation is not completely known. It is simply error to

[36] Proponents of abortion therefore conceded that at least starting at 28 weeks the child has all the physiological development previously believed necessary for experience of pain.

make the statement that the fetus in the early stages of development does not feel pain and the evidence is mounting which is consistent with the conclusion that the fetus does feel pain. It is only in the last decade that the traditional concept, in vogue at the time of *Roe*, that neonates can not feel pain was challenged.

In the current state of medicine, with operative procedures being performed on premature babies as early as five months, it is a standard medical practice to anesthetize the child (at any age). See Porter, F., *Pain in a Newborn*, Neonatal Neurology, Clinics in Neonatology, 16(2) p.549 et seq. 1989.[37] Anesthesia is used on fetuses in operations because of the premature children's experiencing of pain. Detailed hormonal studies in preterm neonates undergoing surgery under minimal anesthesia have shown marked release of catecholamines, as well as autonomic nervous stimulation, heart rate changes, increased hormonal activity and increased motor activity. These activities are consistent with stress experienced with pain. It has been shown that these endocrine metabolic responses are abolished by giving anesthesia to preterm neo-

[37] For general discussion of current medical practice for pain relief for neonates see: Choonara, I, *Management of Pian in Newborn Infants*, in Seminars on Peranotology, 16(i):32-40 (1992); Malhortora, N., L. Han, *Privilege of Analgesia in the Neonate*, in Seminars in Perinatology, 15(5):418-422 (1991).

nates. Rosen, M.A., *Anesthesia for Procedures Involving the Fetus* (1991), Seminars in Perinatology 15:410-417. It has been suggested that the unborn child as young as eight weeks feels discomfort and moves about in the mother's womb precisely to avoid discomfort.[38]

D. The Court Should Take This Case and Re-examine the Question of Whether an Unborn Child Enjoys Rights Under the Fourteenth Amendment

The definition of the word "person"[39] in the Fourteenth Amendment and inquiry concerning when life begins are interrelated. That it is necessary that the law provide a definition is made obvious by the fact that five month old babies prematurely born survive. When a state such as New Jersey permits the potentially painful death of unborn children between five and nine months through abortion no one can seriously debate that these children are persons by any definition. It is irrelevant to such inquiry whether the specific child has been prematurely birthed or

[38] Pinchot, R., *Reproduction of the Cycle of Life*, in the Human Body, Monshol, B., Tonstar Books (1985) p.81.

[39] The first definition of "person" offered by Webster's dictionary is: "an individual human being, especially as distinguished from a thing or lower animal" Webster's Deluxe Unabridged Dictionary, Dorset and Baber, 2nd.ed. 1338 (1983).

lives in a mother's womb.[40] If a person is defined as a being that possesses the essence of a human then the life of a person begins at conception when the individual is complete. We would urge that the Court re-examine the question of when life begins and whether the unborn child enjoys constitutional rights. When a state such as New Jersey offers no protection, the fate of a five, six or seven month old unborn child, whether he or she experience the pain associated with a brutal death through abortion should not hinge upon the misfortune of being within the State of New Jersey. Science and technology is now at such a state in man's knowledge that a reexamination of these questions is required.

III. THE DECISION OF THE NEW JERSEY SUPREME COURT OF MARCH 24, 1992 DECIDED FEDERAL CONSTITUTIONAL QUESTIONS IN A WAY WHICH CONFLICTS WITH THE APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES. IN ADDITION, THIS CASE PRESENTS THE BEST OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO DEFINITIVELY RESOLVE ALL OF THE INTERESTS OF ALL OF THE PARTIES OF AN ABORTION DISPUTE AND TO CLEARLY AND FINALLY DEFINE THE POWERS AND OBLIGATIONS OF THE STATES TO REGULATE AND PROHIBIT ABORTION.

The decision of the New Jersey Supreme Court, in this

[40] An esoteric distinction based upon dependence upon the mother which distinguishes the child's predicament misses the point: an adversarial equal protection argument can only follow the conclusion that both the born and unborn child are persons.

case, by permitting the abortion over the objections of the father, conflicts with the applicable decisions of the U.S. Supreme Court including *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040 (1989), *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926 (1990), *Ohio v. Akron Center for Reproductive Health*, 497, U.S. 502, 110 S.Ct. 2972 (1990), as well as numerous Supreme Court decisions dealing with the rights of the father and child, and federal constitutional principles of due process and equal protection of the laws.

In addition, the competing interests and rights presented by this case, make J.M. v. V.C. the best opportunity for the U.S. Supreme Court to definitively resolve all of the interests of the parties in an abortion dispute and comprehensively define the powers and obligations of a state to regulate and prohibit abortion.

A. THE NEW JERSEY SUPREME COURT DECISION CONFLICTS WITH THE PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT AS THEY RELATE TO THE RIGHTS OF THE UNBORN CHILD.

The trimester system and the *Roe* principle that a State lacks a compelling State interest in potential life prior to the third trimester has been rejected in recent U.S. Supreme Court decisions. In *Webster v. Reproductive Health Services*, supra, the

plurality wrote:

> "We do not see why the State's interest in protecting potential human life should come into existence only at the point of liability and there should therefore be a rigid line allowing State regulation after viability by prohibiting it before viability." 109 S.Ct. at 3057.

The Court cited the dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 744, 106 S.Ct. 2169 (1986), with approval:

> "The State's interest, if compelling after viability, is equally compelling before viability." *Thornburgh* at 476 U.S. at 795, 106 S.Ct. at 2197 (White, J. dissenting).

The plurality opinion of Chief Justice Rehnquist in *Webster* was joined by Justices Kennedy and White. Justice Scalia wrote a concurring opinion which supports the conclusion. Justice O'Connor, on more than one prior occasion, concurred in this statement found in *Webster*. In 1983, she dissented in *Akron v. Akron Center for Reproductive Services*, 462 U.S. 416, 103 S.ct. 2481, noting that "The trimester system cannot be supported as a legitimate useful framework". *Akron, supra* at 454 (O'Connor, J. dissenting). In her dissent in *Thornburgh v. American College of Obstetricians and Gynecologists, supra* 476 U.S. at 814, 828, 106 S.Ct. at 2206, 2213, Justice O'Connor expressed the same

sentiment:

> "I do, however, remain of the views expressed in my dissent in *Akron*, 462 U.S. at 459-466, 103 S.Ct. at 2507-2512. The State has compelling interests in ensuring maternal health and protecting potential human life, and these interests exist 'throughout pregnancy'." *Id.* at 461, 103 S.Ct., at 2509 (O'Connor, J. dissenting).

Thus, five Justices of the current Supreme Court no longer accept that portion of *Roe v. Wade* which found that a State did not have a compelling interest in protecting potential life in the first two trimesters of pregnancy. It also appears from the *Hodgson, supra* and *Ohio v. Akron Center, supra* decisions, that five Justices of the current Court no longer accept the *Roe* statement that a mother's abortion right is "fundamental". Consequently, neither the *Roe* principle that the State does not have a compelling interest in the life of the unborn child during the first two trimesters of pregnancy, nor the principle that the mother's right is "fundamental", are currently the law of the land. See, *Planned Parenthood of Southeaster Pennsylvania v. Casey*, 947 F.2d at 690 to 694 3rd. Cir. 1991. The consequence, when applying applicable case law of the United States Supreme Court to the current case, is that the unborn child enjoys protection under the due process and equal protection clauses. The interest of the State in protecting the child

can only exist concurrently with the personal right of the child (see Brief submitted to State Courts, Appendix, Vol. II:54a to 82a). [41]

If the state has the power to protect the life of a person, the person must possess a corresponding right. The nature of the state's interest is its *parens patriae* jurisdiction. See *Santosky v. Kraemer*, 455 U.S. 745, 766, 102 S.Ct. 1388, 1401 (1982), defining the state's interest in preserving and promoting the welfare of a child as part of its *parens patriae* jurisdiction.[42] When a state asserts the interest of the child, even fundamental Constitutional rights of a parent may be defeated. *Santosky v. Kraemer*, supra. But the *parens patriae* interest of a state cannot exist without a co-existing personal right of the individual being protected. C.f. *Snapp v. Puerto Rico*, 458 U.S. 592, 600, 102 S.Ct. 3260, 3265. See, also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486, 95 S.Ct. 1029, 1042 (1975)(drawing a

[41] Ironically, despite New Jersey's misapplication of the appropriate case law in this case, the New Jersey Supreme Court, in dictum in an unrelated case, (on unrelated issues) reached precisely the same conclusion, stating:

> "The balance struck in *Roe v. Wade* recognizes increasing rights in the fetus and correlative restrictions on the mother as the pregnancy progresses." See *In the Matter of Baby M*, 109 N.J. 396, n.13 at 449. (emphasis added)

[42] *Parens patriae* refers to the role of a state as guardian of persons under legal disability. *Snapp v. Puerto Rico*, 458 U.S. at 600 (sc.8), 102 S.Ct. 3260

distinction in how a state may protect an individual's interest compared to the individual's exercise of his rights.) *Raleigh Fitkin-Paul Morgan Mem. Hospital v. Anderson*, 42 NJ 421 (1964).

B. THE NEW JERSEY SUPREME COURT IS IN CONFLICT WITH THE CASE LAW OF THE UNITED STATES SUPREME COURT WHICH REQUIRES RECOGNITION THAT J.M., AS NATURAL GENETIC FATHER, HAS STANDING TO RAISE THE CONSTITUTIONAL RIGHTS OF HIS UNBORN CHILD, AND THAT J.M. POSSESSES HIS OWN FUNDAMENTAL RIGHTS.

The special relationship between J.M. and his child, based upon the fact that he is the natural genetic father, gives him standing to raise the interests of his child, and that standing is based upon the child's right to be represented, and J.M.'s own constitutional rights. That standing and J.M.'s rights are based upon the prior decisions of the U.S. Supreme Court.[43] J.M. and the child have a constitutional right to the equal protection of the laws. *Shapiro v. Thomson*, 394 U.S. 618, 638 (1969); *Craig v.*

[43] *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, *Truax v. Raich*, 239 U.S. 33, 37 S.Ct. 7; *(standing, generally) Pierce v. Society of Sisters*, 268 U.S. 510, 485 S.Ct. 571 (standing, and the substantive constitutional right of J.M. to discharge his obligations and protect the life of his child); *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388 (1982) (the fundamental right of the infant and that of the father to association and companionship); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110 (1942) (J.M.'s fundamental right to procreate); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972) (J.M.'s right to association and companionship); *Planned Parenthood v. Danforth*, (dissenting and concurring opinions rith to association and companionship) 428 U.S. at 93, 96 S.Ct. at 2852.

Boren, 29 U.S. 109, 97 S.Ct. 451 (1976). See petitioner's development of these issues in his State Court Brief found in Appendix, Vol. II 83a to 101; Vol. II 130a to 143a; Vol. II 20a to 129a.7

Where the State of New Jersey does not exercise its power to protect the life of the unborn child, the child and his father are not helpless to exercise theirs. The child, if possessing protectable rights can only act under these circumstances through the father; thus denial of the father's access to Court, is a denial of the child's own rights. For his own part, the father has the right to assert his own interests, as well as those of his child.

C. NEW JERSEY MISAPPLIED PRIOR DECISIONS OF THE SUPREME COURT IN ANALYZING WHETHER THE RIGHTS OF J.M. AND THE CHILD OUTWEIGH ANY PRIVACY INTEREST OF V.C.

The New Jersey Supreme Court failed to properly apply prior decisions of the United States Supreme Court balancing the rights of the father, child and mother. Because J.M. possesses his own constitutional rights and asserts those of the unborn child, V.C.'s privacy interests concerning the pregnancy would be outweighed by J.M.'s interest in protecting the life of his child (see State Court Brief found at Vol. II:102a-109a) *Cf. Nixon v. Warner*

Communications, 435 U.S. 589, at 602-684, 98 S.Ct. 1306, 1314, 1315.

The interest and potential harms[44] to a mother were listed by the *Roe* Court: (1) maternity or additional offspring may force upon a woman a distressful life and future; (2) mental, physical health may be taxed by child care; (3) the stress associated with an unwanted child; and (4) additional difficulties and continuing stigma of unwed motherhood. *Roe v. Wade*, 410 U.S. at 153, 93 S.Ct. at 727. That these are legitimate concerns that implicate the right of privacy, there can be no doubt. But they do not outweigh the father's interest and that of the child to protect the life of the unborn child, or the rights of J.M. himself. These are only reasons to avoid a pregnancy in the first place; not a reason to take the life of a human being. It is a well established right of a woman and couples to prevent pregnancy and State action which would interfere with that right is unconstitutional. See *Griswold, supra*. The balancing of the interests of the child and father against those of the mother can be accomplished only by preserving the life of

[44] Where a mother's life is not at stake and pregnancy is not the result of rape.

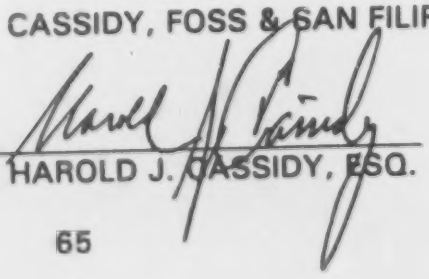
the child.[45] To declare the mother's rights superior would frustrate, completely, the rights of both the child and the father with the worst possible consequence to both. Allowing the child to live does not frustrate the stated interests of the mother as set forth in *Roe v. Wade*, in circumstances where: (1) the life of the mother is not in danger; and (2) the pregnancy was the result of voluntary conduct on the part of the mother and therefore it cannot be said that she was denied her *Griswold* rights.[46] A state's interest and therefor the father's interest and that of the child, to preserve the child's life would prevail over those of the mother.

[45] Once the dispute was before the New Jersey courts, the court was bound to protect the constitutional rights of the child and father. *See, Shelly v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 845 (1948) ("...judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common law policy"); *Bell v. State of Maryland*, 378 U.S. 226, 308-309, 84 S.Ct. 1814, 1859 (1964) ("a state applying its statutory or common law to deny rather than protect the right of access to public accommodations has...denied the constitutions by intended equal protection).

[46] See, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494, 95 S.Ct. 1029, 1046 (1975).

Respectfully submitted,

CASSIDY, FOSS & SAN FILIPPO

By: 

HAROLD J. CASSIDY, ESQ.

APPENDIX

This complete list of citations comprises 173 cases in which the U.S. Supreme Court has overruled a prior decision of constitutional law.

1. *Hudson v. Guestier*, 6 Cr. (10 U.S. 281, 285 (1810) (overruling *Rose v. Himley*, 4 Cr. (8 U.S.) 241 (1808)).

2. *Gordon v. Ogden*, 3 Pet. (28 U.S.) 33, 34 (1830) (overruling *Wilson v. Daniel*, 3 Dall. (3 U.S.) 401 (1798)).

3. *Greene v. Lessee of Neal*, 6 Pet. (31 U.S.) 291 (1832) (overruling *Patton v. Easton*, 1 Wheat. (14 U.S.) 476 (1816); *Powell's Lessee v. Harmon*, 2 Pet. (27 U.S.) 241 (1829)).

4. *Louisville Railroad Co. v. Letson*, 2 How. (43 U.S.) 497, 554-556 (1844) (overruling *Commercial and Railroad Bank v. Slocomb*, 14 Pet. (39 U.S.) 60 (1840) and *Strawbridge v. Curtiss*, 3 Cr. (7 U.S.) 267 (1806); *Qualifying Bank of the United States v. Deveaux*, 5 Cr. (9 U.S.) 61 (1809)).

5. *The Genessee Chief*, 12 How. (53 U.S.) 443, 456 (1851) (overruling *The Thomas Jefferson*, 10 Wheat. (23 U.S.) 428 (1825); *The Orleans v. Phoebus*, 11 Pet. (36 U.S.) 175 (1837)).

6. *Gazzam v. Phillip's Lessee*, 20 How. (61 U.S.) 372, 377-378 (1858) (overruling *Brown's Lessee v. Clements*, 3 How. (44 U.S.) 650 (1845)).

7. *Suydam v. Williamson*, 24 How. (65 U.S.) 427 (1861) (overruling *Williamson v. Berry*, 8 How. (49 U.S.) 495 (1850); *Williamson v. Irish Presbyterian Congregation*, 8 How. (49 U.S.) 565 (1850); *Williamson v. Ball*, 8 How. (49 U.S.) 566 (1850)).

8. *Mason v. Eldred*, 6 Wall. (73 U.S.) 231, 238 (1868) (overruling *Sheehy v. Mandeville*, 6 Cr. (10 U.S.) 253 (1810)).

9. *The Belfast*, 7 Wall. (74 U.S.) 624, 641 (1869) (overruling *Allen v. Newberry*, 21 How. (62 U.S.) 244 (1858) (in part)).

10. *Knox v. Lee* (The Legal Tender Cases), 12 Wall. (79 U.S.) 457, 553 (1871) (overruling *Hepburn v. Griswold*, 8 Wall. (75 U.S.) 603 (1870)).

11. *Trebilcock v. Wilson*, 12 Wall. (79 U.S.) 687 (1871) (overruling *Roosevelt v. Meyer*, 1 Wall (68 U.S.) 512 (1863)).

12. *Hornbuckle v. Toombs*, 18 Wall. (85 U.S.) 648, 652-653 (1874) (overruling *Noonan v. Lee*, 2 Bl. (67 U.S.) 499 (1863); *Orchard v. Hughes*, 1 Wall. (68 U.S.) 73, 77 (1864); *Dunphy v. Kleinsmith*, 11 Wall. (78 U.S.) 610 (1871)).

13. *Union Pac. R. Co. v. McShane*, 22 Wall. (89 U.S.) 444 (1874) (overruling *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (83 U.S.) 603 (1873) (in part)).

14. *County of Cass v. Johnston*, 95 U.S. 360 (1877) (overruling *Harshman v. Bates County*, 92 U.S. 569 (1875)).

15. *Fairfield v. County of Gallatin*, 100 U.S. 47 (1879) (overruling *Town of Concord v. Savings-Bank*, 92 U.S. 625 (1875)).

16. *Tilghman v. Proctor*, 102 U.S. 707 (1880) (overruling *Mitchell v. Tilghman*, 19 Wall. (86 U.S.) 287 (1873)).

17. *Kilbourn v. Thompson*, 103 U.S. 168, 192-200 (1881) (overruling *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204 (1821)).

18. *United States v. Phelps*, 107 U.S. 320, 323 (1883) (overruling *Shelton v. The Collector*, 5 Wall. (72 U.S.) 113, 118 (1867)).

19. *Kountze v. Omaha Hotel Co.*, 107 U.S. 378, 387 (1883) (overruling *Stafford v. The Union Bank of Louisiana*, 16 How. (57 U.S.) 135 (1853)).

20. *Morgan v. United States*, 113 U.S. 476, 496 (1885) (overruling *Texas v. White*, 7 Wall. (74 U.S.) 700 (1869).

21. *Wabash, S.L. & P. Ry. Co. v. Illinois*, 118 U.S. 557 (1886) (overruling *Peik v. Chicago & N.W. Ry. Co.*, 94 U.S. 164 (1877) ("substantially though not expressly overruled")).

22. *Phila. Steamship Co. v. Pennsylvania*, 122 U.S. 326 (1887) (overruling *State Tax on Railway Gross Receipts*, 15 Wall. (82 U.S.) 284 (1873) ("basic grounds of decision repudiated")).

23. *In re Ayers*, 123 U.S. 443 (1887) (overruling *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824)).

24. *Leloup v. Port of Mobile*, 127 U.S. 640, 647 (1888) (overruling *Osborne v. Mobile*, 16 Wall. (83 U.S.) 479 (1873)).

25. *Leisy v. Hardin*, 135 U.S. 100, 118 (1890) (overruling *Peirce v. New Hampshire*, 5 How. (46 U.S.) 504 (1847)).

26. *Brenham v. German-American Bank*, 144 U.S. 173, 187 (1892) (overruling *Rogers v. Burlington*, 3 Wall. (10 U.S.) 654 (1866); *Mitchell v. Burlington*, 4 Wall. (71 U.S.) 270 (1867)).

27. *Roberts v. Lewis*, 153 U.S. 367, 377 (1894) (overruling *Giles v. Little*, 104 U.S. 291 (1881)).

28. *Pollock v. Farmer's Loan & Trust Co.*, 158 U.S. 601 (1895) (overruling *Hylton v. United States*, 3 Dall. (3 U.S.) 171 (1796)).

29. *Garland v. Washington*, 232 U.S. 642, 646 (1914) (overruling *Crain v. United States*, 162 U.S. 625 (1896)).

30. *United Staes v. Nice*, 241 U.S. 591, 601 (1916) (overruling *In re of Heff*, 197 U.S. 488 (1905)).

31. *Pennsylvania R.R. Co. v. Towers*, 245 U.S. 6, 17 (1917) (overruling *Lake Shore & M.S. Ry. Co. v. Smith*, 173 U.S. 684 (1899) (in part)).

32. *Rosen v. United States*, 245 U.S. 467, 470 (1918) (overruling *United States v. Reid*, 12 How. (53 U.S.) 361 (1851)).

33. *Boston Store v. American Graphophone Co.*, 246 U.S. 8, 25 (1918); *Motion Picture Co. v. Universal Film Co.*, 243 U.S. 502, 518 (1917) (overruling *Henry v. Dick Co.*, 224 U.S. 1 (1912)).

34. *Terrell v. Burke Constr. Co.*, 257 U.S. 529, 533 (1922) (overruling *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1877); *Security Mutual Life Ins. Co. v. Prewitt*, 202 U.S. 246 (1906)).

35. *Lee v. Chesapeake & Ohio Ry.*, 260 U.S. 653, 659 (1923) (overruling *Ex parte Wisner*, 203 U.S. 449 (1906); qualifying; *In re Moore*, 209 U.S. 490 (1908)).

36. *Alpha Cement Co. v. Massachusetts*, 268 U.S. 203, 218 (1925) (overruling *Baltic Mining Co. v. Massachusetts*, 231 U.S. 68 (1913)).

37. *Ches. & Ohio Ry. Co. v. Leitch*, 276 U.S. 429 (1928) (rehearing) (overruling *Chesapeake and Ohio Ry. Co. v. Leitch*, 275 U.S. 507 (1927) (not recorded)).

38. *Gleason v. Seaboard Ry.*, 278 U.S. 349, 357 (1929) (overruling *Friedlander v. Texas & Railway Co.*, 130 U.S. 416 (1889) (in part)).

39. *Farmers Loan Co. v. Minnesota*, 280 U.S. 204, 209 (1930) (overruling *Blackstone v. Miller*, 188 U.S. 189 (1903)).

40. *East Ohio Gas Co. v. Tax Comm.*, 283 U.S. 465, 472 (1931) (overruling *Penna. Gas Co. v. Pub. Service Comm.*, 292 U.S. 23 (1920)).

41. *Chicago & E.I.R. Co. v. Commission*, 284 U.S. 296 (1932) (overruling *Erie R.R. Co. v. Collins*, 253 U.S. 77 (1920); *Erie R.R. Co. v. Szary*, 253 U.S. 86 (1920)).

42. *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (overruling *Long v. Rockwood*, 277 U.S. 142 (1928)).

43. *New York ex rel. Northern Finance Corp. v. Lynch*, 290 U.S. 601 (1933) (overruling *Macallen Co. v. Massachusetss*, 279 U.S. 620 (1929). *See also United States v. City of Detroit*, 355 U.S. 466, 472 n. 2 (1958)).

44. *Funk v. United States*, 290 U.S. 371, 373, 386 (1933) (overruling *Stein v. Bowman*, 13 Pet. (38 U.S.) 209 (1839) (in part); *Hendrix v. United States*, 219 U.S. 79 (1911); *Logan v. United States*, 144 U.S. 263 (1892); *Jim Fuey Moy v. United States*, 254 U.S. 189 (1920)).

45. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Morehead v. N.Y. ex rel. Tipaldo*, 298 U.S. 587 (1936)).

46. *R.R. Comm. v. Pacific Gas Co.*, 302 U.S. 388 (1938) (rehearing) (overruling *Railroad Commission v. Pacific Gas Co.*, 301 U.S. 669 (1937) (not recorded)).

47. *Helvering v. Producers Corp.*, 303 U.S. 376 (1938) (overruling *Gillespie v. Oklahoma*, 257 U.S. 501 (1922); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932)).

48. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 69, 79 (1938) (overruling *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842)).

49. *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466 (1939) (overruling *Dobbins v. Erie County*, 16 Pet. (41 U.S.) 435 (1842); *Collector v. Day*, 11 Wall. (78 U.S.) 113 (1871); N.Y. ex rel. *Rogers v. Graves*, 299 U.S. 401 (1937); *Brush v. Commissioners*, 300 U.S. 352 (1937)).

50. *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939) (overruling *Proctor & Gamble v. United States*, 225 U.S. 282 (1912)).

51. *O'Malley v. Woodrough*, 307 U.S. 277 (1939) (overruling *Evans v. Gore*, 253 U.S. 245 (1920)).

52. *Madden v. Kentucky*, 309 U.S. 83 (1940) (overruling *Colgate v. Harvey*, 296 U.S. 404 (1935)).

53. *Helvering v. Hallock*, 309 U.S. 106 (1940) (overruling *Helvering v. St. Louis Trust Co.*, 296 U.S. 39 (1935); *Becker v. St. Louis Trust Co.*, 296 U.S. 48 (1935)).

54. *Tigner v. Texas*, 310 U.S. 141 (1940) (overruling *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902)).

55. *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (limited)).

56. *United States v. Chicago, M.St. P. & P.R. Co.*, 312 U.S. 592 (1941) (overruling *United States v. Lynch*, 188 U.S. 445 (1903) (in part); *United States v. Heyward*, 250 U.S. 633 (1919) (not recorded)).

57. *Nye v. United States*, 313 U.S. 33 (1941) (overruling *Toldeo Newspaper Co. v. United States*, 247 U.S. 401 (1918)).

58. *California v. Thompson*, 313 U.S 109 (1941) (overruling *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927)).

59. *United States v. Classic*, 313 U.S 299 (1941) (overruling *Newberry v. United States*, 256 U.S. 232 (1921)).

60. *Olsen v. Nebraska*, 313 U.S. 236 (1941) (overruling *Ribnik v. McBride*, 277 U.S. 250 (1928)).

61. *Alabama v. King & Boozer*, 314 U.S. 1 (1941) (overruling *Panhandle Oil Co. v. Knox*, 277 U.S. 219 (1928); *Graves v. Texas Company*, 298 U.S. 393 (1936)).

62. *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118 (1941) (overruling *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921)).

63. *Edwards v. California*, 314 U.S. 160 (1941) (overruling *City of New York v. Miln*, 11 Pet. (36 U.S.) 103 (1837)).

64. *State Tax Comm. v. Aldrich*, 316 U.S. 174 (1942) (overruling *First National Bank v. Maine*, 284 U.S. 312 (1932)).

65. *Williams v. North Carolina*, 318 U.S. 287 (1942) (overruling *Haddock v. Haddock*, 201 U.S. 562 (1906)).

66. *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1943) (overruling *Johnson v. Fleet Corporation*, 280 U.S. 320 (1930)).

67. *Jones v. Opelika*, 319 U.S. 103 (1943) (re-argument); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (overruling *Jones v. Opelika*, 316 U.S. 584 (1942)).

68. *Oklahoma Tax Comm. v. United States*, 319 U.S. 598 (1943) (overruling *Childers v. Beaver*, 270 U.S. 555 (1926)).

69. *Board of Education v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville District v. Gobitis*, 310 U.S. 586 (1940)).

70. *FPC v. Hope Gas Co.*, 320 U.S. 591 (1944) (overruling *United Railways v. West*, 280 U.S. 234 (1930 (in part)).

71. *Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661 (1944) (overruling *Leeds & Catlin Co. v. Victor Talk. Mach. (no. 2)*, 213 U.S. 325 (1909) (limited)).

72. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944) (overruling *Plamals v. Pinar Del Rio*, 277 U.S. 151 (1928) (in part)).

73. *Smith v. Allwright*, 321 U.S. 649 (1944) (overruling *Grovey v. Townsend*, 295 U.S. 45 (1935)).

74. *United States v. Southeastern Underwriters' Assn.*, 322 U.S. 533 (1944) (overruling *Paul v. Virginia*, 8 Wall. (75 U.S.) 168 (1869); *United States v. Schwimmer*, 279 U.S. 644 (1929)).

75. *Girouard v. United States*, 328 U.S. 61 (1946) (overruling *United States v. MacIntosh*, 283 U.S. 605 (1931); *United Stats v. Bland*, 283 U.S. 636 (1931)).

76. *Halliburton Co. v. Walker*, 3298 U.S. 1 (1946) (rehearing) (overruling *Halliburton Co. v. Walker*, 326 U.S. 696 (1946)).

77. *MacGregor v. Westinghouse Co.*, 329 U.S. 402 (1947) (rehearing) (overruling *MacGregor v. Westinghouse Co.*, 327 U.S. 758 (1946)).

78. *Angel v. Buelington*, 330 U.S. 183 (1947) (overruling *David Lupton's Sons v. Auto. Club of Am.*, 225 U.S. 489 (1912) (rendered obsolete by prior change in law)).

79. *Zap v. United States*, 330 U.S. 800 (1947) (rehearing) (overruling *Zap v. United States*, 328 U.S. 624 (1946)).

80. *Thibaut v. Car and General Ins. Corp.*, 332 U.S. 828 (1947) (on rehearing) (overruling *Thibaut v. Car and General Ins. Corp.*, 332 U.S 751 (1947)).

81. *Sherrer v. Sherrer*, 334 U.S. 343 (1948) (overruling *Andrews v. Andrews*, 188 U.S. 14 (1908) (in part)).

82. *Lincoln Federal Labor Union v. Northwestern*, 335 U.S. 525 (1949) (overruling *Adair v. United States*, 208 U.S. 161 (1908)) *See also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (overruling *Coppage v. Kansas*, 236 U.S. 1 (1915)).

83. *Comr. v. Estate of Church*, 335 U.S. 632, 637 (1949) (overruling *May v. Heiner*, 281 U.S. 238 (1930)).

84. *Ott v. Mississippi Barge Line*, 336 U.S. 169 (1949) (overruling *St. Louis v. Ferry Company*, 11 Wall. (78 U.S.) 423 (1870); *Old Dominian Steamship Co. v. Virginia*, 198 U.S. 299 (1905); *Ayer & Lord Co. v. Kentucky*, 202 U.S. 409 (1906)).

85. *Oklahoma Tax Comm. v. Texas Co.*, 336 U.S. 342 (1949) (overruling *Choctaw & Gulf R.R. v. Harrison*, 235 U.S. 292 (1914); *Indian Oil Co. v. Oklahoma*, 240 U.S. 522 (1916); *Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1918); *Large Oil Co. v Howard*, 248 U.S. 549 (1919); *Oklahoma v. Barnsdall Corp.*, 296 U.S. 521 (1936)).

86. *Cosmopolitan Co. v. McAllister*, 336 U.S. 783 (1949) (overruling *Hust v. Moore-McCormack Lines*, 328 U.S. 707 (1946)).

87. *United States v. Rabinowitz*, 339 U.S. 56, 66, 85 (1950) (overruling *Trupiano v. United States*, 334 U.S. 699 (1948); *McDonald v. United States*, 335 U.S. 451 1948)).

88. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (overruling *Mutual Film Corp. v. Ohio Indus'l Comm.*, 236 U.S. 230 (1915)).

89. *Brown v. Board of Education*, 347 U.S. 483, 491, 494-495 (1954) (overruling *Cumming v. Board of Education*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78 (1927)).

90. *In re Disbarment of Isserman*, 348 U.S. 1 (1954) (on rehearing) (overruling *In re Isserman*, 345 U.S. 286 (1953)).

91. *Gayle v. Browder*, 352 U.S. 903 (1956) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

92. *Reid v. Covert*, 354 U.S. 1 (1957) (overruling *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956)).

93. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 419 (1957) (overruling *Thompson v. Thompson*, 226 U.S. 551 (1913)). *See also Armstrong v. Armstrong*, 350 U.S. 568, 581 (1956)).

94. *Ladner v. United States*, 358 &U.S. 169 (1958) (rehearing) (overruling *Ladner v. United States*, 355 U.S. 282 (1958)).

95. *United States v. Raines*, 362 U.S. 17, 27 (1960) (overruling *United States v. Reese*, 92 U.S. 214, 220-221 (1876)).

96. *Elkins v. United States*, 364 U.S. 206, 210, 212-213, 283 (1960); *Rios v. United States*, 364 U.S. 253 (1960) (overruling *Weeks v. United States*, 282 U.S. 386, 398 (1914) (in part); *Center v. United States*, 267 U.S. 575 (1925); *Byars v. United States*, 273 U.S. 28, 33 (1927) (in part); *Feldman v. United States*, 322 U.S. 487, 492 (1944) (in part)).

97. *James v. United States*, 366 U.S. 213, 215, 221, 223, 241 (1961) (overruling *CIR v. Wilcox*, 327 U.S. 404 (1946)).

98. *Mapp v. Ohio*, 367 U.S. 643, 653-655 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949) (in part)); *See also Ker v. California*, 374 U.S. 23, 45, 53, 59 (1963) (overruling *Irving v. California*, 347 U.S. 128 (1954) (in part)).

99. *Baker v. Carr*, 369 U.S. 186, 277, 280 (1962) (overruling *Colegrove v. Green*, 328 U.S. 549 (1946) (in part)).

100. *Wesberry v. Sanders*, 376 U.S. 1 (1964) (overruling *Colegrove v. Barrett*, 330 U.S. 804 (1947)).

101. *Smith v. Evening News Assn.*, 371 U.S. 195, 199 (1962) (overruling *Westinghouse Employees v. Westinghouse Corp.*, 348 U.S. 437 (1955) (in part)). *See also Truck Drivers Union v. Riss & Co.*, 372 U.S. 517, 520 (1963).

102. *Construction Laborers v. Curry*, 371 U.S. 542, 552, 554 (1963) (overruling *Building Union v. Ledbetter Co.*, 344 U.S. 178 (1952) (in part)).

103. *Gideon v. Wainwright*, 372 U.S. 335, (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)).

104. *Gray v. Sanders*, 372 U.S. 368, 383 (1963) (overruling *Cook v. Fortson, Turman v. Duckworth*, 329, U.S. 675 (1946); *South v. Peters*, 339 U.S. 276 (1950); *Cox v. Peters*, 342 U.S. 936 (1952); *Hartsfeld v. Sloan*, 357 U.S. 916 (1958)).

105. *Fay v. Noia*, 372 U.S. 391, 435 (1963) (overruling *Darr v. Burford*, 339 U.S. 200 (1950) (in part)).

106. *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (overruling *Adams v. Tanner*, 244 U.S. 590 (1917)).

107. *Schneider v. Rusk*, 377 U.S. 163 (1964) (overruling *Mackenzie v. Hare*, 239 U.S. 299 (1915)).

108. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (overruling *Twining v. New Jersey*, 311 U.S. 78 (1908); *Adamson v. California*, 332, U.S. 46 (1947)).

109. *Murphy v. Waterfront Comm.*, 378 U.S. 52, 57, 77 (1964) (overruling *Jack v. Kansas*, 199 U.S. 372 (1905); *United States v. Murdock*, 284 U.S. 141 (1931); *Feldman v. United States*, 322 U.S. 487 (1944); *Knapp v. Schweitzer*, 357 U.S. 371 (1958); *Mills v. Louisiana*, 360 U.S. 230 (1959)).

110. *Jackson v. Denno*, 378 U.S. 368, 391 (1964) (overruling *Stein v. New York*, 346 U.S. 156 (1953)).

111. *Escobedo v. Illinois*, 378, U.S. 478, 491-492 (1964) (overruling *Crooker v. California*, 357 U.S. 433 (1958); *Cicenia v. LaGay*, 357 U.S. 504 (1958)).

112. *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (overruling *West v. Louisiana*, 194 U.S. 258 (1904)).

113. *Gold v. DiCarlo*, 380 U.S. 520 (1965) (overruling *Tyson & Bro. v. Banton*, 273 U.s. 418 (1927)).

114. *Swift & Co. v Wickham*, 382 U.S. 111 (1965) (overruling *Kesler v. Dept of Public Safety*, 369 U.S. 153 (1962)).

115. *Harris v. United States*, 382 U.S. 162 (1965) (overruling *Brown v. United States*, 359 U.S. 41 (1959)).

116. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (overruling *Breedlov v. Suttles*, 302 U.S. 277 (1937); *Butler v. Thompson*, 341 U.S. 937 (1951)).

117. *Spevack v. Klein*, 385 U.S. 511 (1967) (overruling *Cohen v. Hurley*, 366 U.S. 177 (1961)).

118. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (overruling *Adler v. Board of Education*, 342 U.S. 485 (1952)).

119. *Afroyim v. Rusk*, 387 U.S. 253 (1967) (overruling *Perez v. Brownell*, 356 U.S. 44 (1958)).

120. *Warden v. Hayden*, 387 U.S. 294 (1967) (overruling *Gouled v. United States*, 255 U.S. 298 (1921)).

121. *Camara v. Municipal Court*, 387 U.S. 523 (1967) (overruling *Frank v. Maryland*, 359 U.S. 360 (1959)).

122. *Berger v. New York*, 388 U.S. 41 (1967) (overruling *Olmstead v. United States*, 277 U.S. 437 (1928) (in part)).

123. *Katz v. United States*, 389 U.S. 347 (1967) (overruling *Olmstead v. United States*, 277 U.S. 438 (1928)).

124. *Peyton v. Rowe*, 391 U.S. 54 (1968) (overruling *McNally v. Hill*, 293 U.S. 131 (1934)).

125. *Bruton v. United States*, 391 U.S. 123 (1968) (overruling *Delli Paoli v. United States*, 352 U.S. 232 (1957)).

126. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (overruling *Maxwell v. Dow*, 176 U.S. 581 (1900)).

127. *Carafax v. LaVallee*, 391 U.S. 234 (1968) (overruling *Parker v. Ellis*, 362 U.S. 574 (1960)).

128. *Lee v. Florida*, 392 U.S. 378 (1968) (overruling *Schwartz v. Texas*, 344 U.S. 199 (1952)).

129. *Jones v. Alfred H. Mayer Co.*, 382 U.S. 409, 441-443 (1968) (overruling *Hodges v. United States*, 203 U.S. 1 (1906)).

130. *Moore v. Ogilvie*, 394 U.S. 814 (1969) (overruling *MacDougall v. Green*, 335 U.S. 281 (1948)).

131. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (overruling *Whitney v. California*, 274 U.S. 357 (1927)).

132. *Chimel v. California*, 395 (U.S. 752 (1969) (overruling *Harris v. United States*, 331 U.S. 145 (1947); United *States v. Rabinowitz*, 339 U.S. 56 (1950)).

133. *Benton v. Maryland*, 395 U.S. 784 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1967)).

134. *Ashe v. Swenson*, 397 U.S. 436 (1970) (overruling *Hoog v. New Jersey*, 356 U.S. 464 (1958)).

135. *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970) (overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962)).

136. *Prince v. Georgia*, 398 U.S. 323, 329-330 (1970) (overruling *Brantley v. Georgia*, 217 U.S. 284 (1910)).

137. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) (overruling *The Harrisburg*, 119 U.S. 199 (1886)).

138. *Williams v. Florida*, 399 U.S. 78 (1970) (overruling in part *Thompson v. Utah*, (170 U.S.) 343 (1898), *Rassmussen v. United States*, 197 U.S. 516 (1905)).

139. *Blonder-Tongue Labs v. Univ. of Ill. Foundation*, 402 U.S. 313 (1971) (overruling *Triplett v. Lowell*, 297 U.S. 638 (1936)).

140. *Andrews v. L. & N.R. Co.*, 406 U.S. 320 (1972) (overruling *Moore v. Ill. Cent. R. Co.*, 312 U.S. 630 (1941)).

141. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (overruling in part *Fuentes v. Shevin*, 407 U.S. 67 (1972)).

142. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (overrulling *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1907); *Western Turf Asssociation v. Greenberg*, 204 U.S. 359, 363; *See also Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

143. *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971) (overruling *Kesler v. Dept of Public*

Safety, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962)).

144. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (overruling *Pope v. Williams*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904)).

145. *Lehnkausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973) (overruling *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927 (1928)).

146. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (overruling *A book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966)).

147. *North Dakota Pharmacy Board v. Snyder's Drug Stores*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973) (overruling *Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 73, L.Ed. 204 (1929)).

148. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (overruling *Shapiro v. Thompson*, 394 U.S. 6128, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (in part)).

149. *State Dept. of Health & Rehabilitative Services v. Zarate*, 407 U.S. 918, 92 S.Ct. 2462, 32 L.Ed.2d 803 (1972); and *Sterrett v. Mothers' & Children's Rights Organization*, 409 U.S. 809, 93 S.Ct. 68, 34 L.Ed.2d 70 (1972):

150. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.t. 692, 42 L.Ed.2d 690 (1975) (overruling *Hoyt v. Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.21d 118 (1961) (in effect)).

151. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976) (overruling *Low v. Austin*, 13 Wall. 29, 20 L.Ed. 517 (1872)).

152. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d

346 (1976) (overruling *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942)).

153. *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968)).

154. *New Orleans v.Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (overruling *Morey v. Doud*, 354 u.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957);

155. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (overruling *Goesaert v. Cleary*, 335 U.S. 464, 69 S.Ct. 197, 92 L.Ed. 163 (1948);

156. *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (overruling *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951);

157. *Schaeffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (overruling *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878)).

158. *Dept. of Revenue of Washington v. Washington Stevedoring Cos.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2ds 682 (1978) (overruling *Puget Sound Stevedoring Co. v. State Tax Commn.*, 302 U.S. 90, 58 S.Ct. 72, 82, L.Ed. 68 (1937)).

159. *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358, 95 S. Ct. 1006, 43 L.Ed.2d 250 (1975)).

160. *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (overruling *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed.793 (1896)).

161. *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) (overruling *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)).

162. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (overruling *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237 (1922)).

163. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (overruling *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)).

164. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (overruling *Rolston v. Missouri Fund Comm'rs.*, 120 U.S. 390, 7 S.Ct. 499, 30 L.Ed. 721 (1887) (in part)).

165. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) (overruling *Coffey v. United States*, 116 U.S. 436, 6 S.Ct. 437, 29 L.Ed. 684 (1886)).

166. *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (overruling *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976)).

167. *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) (overruling in part *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)).

168. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (overruling *Parratt v. Taylor*, 451 U.S. 527, 1010 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (in part)).

169. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1868) (overruling *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (in part)).

170. *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d364 (1987) (overruling *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969)).

171. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987) (overruling *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964)(in part)).

172. *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988) (overruling *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895)).

173. *Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (overruling *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (in part)).